SEXUAL DISCRIMINATION AND THE FAMILY COURT

THE HONOURABLE MR JUSTICE NYGH*

The Family Court has been the subject of much criticism over the years since its foundation. This is not surprising for a court which affects the ordinary citizen at such close range.

Like so many institutions which try to steer a middle course, the Court has come under criticism on the one hand from feminist writers, amongst whom Dr Jocelynne Scutt is the most prominent,[1] for being too "patriarchal". On the other hand objections have also been heard on the male side: the most eloquent of these is Mr Geoffrey Lehmann who has sought to enter the lists on behalf of "judicially discarded fathers" who have been denied custody and/or access.[2]

This paper will seek to investigate some of the complaints, to see whether they are justified, and if so, what, if anything, can be done to rectify the situation.

I. FORMAL DISCRIMINATION

There are since 1983 no longer any rules in the Family Law Act which in terms discriminate between men and women. Such discrimination certainly existed in the past, the most notorious example being the Victorian Marriage Act 1928 which remained in force till 1961, whereby a husband under section 76 could petition for divorce on the ground of his wife's single act of adultery, but a wife under section 75(e) could only present a petition on the ground of the husband's repeated acts of adultery or adultery committed in

*L.L.M. (Syd.), S.J.D. (Mich.), Judge of the Family Court of Australia, Appeals Division.

1 J. Scutt, *Even in the Best of Homes* (1983) esp. 328-363, 252-259; J. Scutt and D. Graham, *For Richer, For Poorer* (1984) *passim*; J. Scutt, "Principle v Practice: Defining 'Equality' in Family Property Division and Divorce" (1983) 57 *ALJ* 143.

2 G. Lehmann, "The Fault in No Fault Divorce" (April 1983) *Quadrant* 25, 27.

the conjugal residence coupled with circumstances or conduct of aggravation.

Such crude discrimination was archaic even in 1961. However, the Family Law Act itself, when first enacted in 1975, did contain one provision which did lay down a specific rule for women only. This was found in section 75(2)(l) which directed the Court in applications for maintenance, and indirectly in applications for property settlement, to consider: "the need to protect the position of a woman who wishes only to continue her role as a wife and mother".

The rule, as stated, was not overtly discriminatory against women; indeed it could be represented as being in favour of women, or rather a particular group of them. However, it reflected an assumption which for long underlay family law: that the role of the married woman was that of homemaker and parent and not in the workforce. In so far as it reflected that assumption, the paragraph was inconsistent with the general tenor of the Family Law Act and, in so far as it reflected a desire to keep women at home, it was in effect a discrimination against those who seek emancipation.

The paragraph was in effect meaningless as the Family Court soon pointed out. It could only apply on its own terms to a woman who remained both a wife and a mother. Since under section 48 the will of a party to divorce the other prevails after one year's separation, it was impossible to maintain that desire for longer than 12 months after separation.[3] In 1983 the paragraph was amended to read in ostensibly non-sexist terms: "the need to protect a party who wishes to continue that party's role as parent".

In relation to judge-made law there has been a similar tendency to remove long-standing rules and assumptions which were based on the traditional roles of the sexes. In relation to custody, the so-called maternal preference found one of its last, but most eloquent defenders in Glass J.A. of the New South Wales Court of Appeal who said in *Epperson* v. *Dampney*:

> I am directed by authority to apply the common knowledge possessed by all citizens of the ordinary human nature of mothers . . . That knowledge includes an understanding of the strong natural bond which exists between mother and child. It includes an awareness that young children are best off with both parents, but if parents are separated, they are better off with their mother. The bond between a child and a good mother... expresses itself in an unrelenting and self-sacrificing fondness which is greatly to the child's advantage. Fathers and stepmothers may seek to emulate it and on occasions do so with tolerable success. But the mother's attachment is biologically determined by deep genetic forces which can never apply to them.[4]

This statement is no longer representative of judicial opinion. In *Gronow* v. *Gronow* Stephen J. commented:

> I take it to be the very common, although not invariable, past experience of mankind that mothers have tended to be better able to care for little children than have fathers. The causes contributing to this, perhaps including the male's customary role as breadwinner and woman's social conditioning to a mothering role, are, for present

3 *In the Marriage of McHarg* (1980) 7 Fam L N No. 4.

4 (1976) 10 ALR 227, 241.

> purposes, important only as a reminder that as causes alter or disappear the result will change accordingly. Even in a community of unchanging social conditions, hard or fast rules or presumptions, based only upon matters of common but not invariable experience, provide a poor basis for the assessment of human behaviour compared with detailed investigation of the individuals in question. In times of rapid social change their inadequacy will be the greater.[5]

In other words it is not an immutable biological law which ties women to a certain role, it is society which produces this consequence.

More atavistic is the notion long held by judges that a woman claimant's prospects of re-marriage should be assessed in mitigation of her future needs having regard to her physical appearance in court. This can only be explained on the basis that marriage is a future career prospect for women for which they are selected on their bodies. This approach was deprecated by me in *In the Marriage of Woolley*,[6] as reflecting an outdated morality no longer consonant with the Family Law Act 1975. Nevertheless it found some late defenders even amongst judges of the Family Court.[7] However Evatt C.J. with the concurrence of Butler J. said in the Full Court in *In the Marriage of Rouse (No 2)*:

> I must register once more a protest that the wife was subjected to a personal assessment of her likelihood of re-marriage. As a general statistical factor it can be considered and certainly if there is any definite evidence of a relationship by one party and their intention as to that relationship those factors can be considered.[8]

With respect it is difficult to see how re-marriage can even be relevant as a statistical prospect. Certainly the issue is relevant to the question of whether future spouse maintenance should be quantified as a lump sum, but otherwise the choice of how a woman should be supported in the future, should be hers.

II. THE ABOLITION OF FAULT

The abolition of fault as a consideration not only in the granting of a decree of dissolution, but also, and especially, in relation to custody and property matters, must be seen a major advance towards sexual equality. Whilst the concept of matrimonial fault might be seen by some women as a shelter against being arbitrarily set aside, it inflicted on most women an economic and social penalty for leaving unsatisfactory, but matrimonially virtuous, husbands.

The husband who ignored the needs of his wife and children for the pressure of business or the mateship of the pub – some may regard him as the archetypal Australian male – but who did not beat his wife, starve his family or sleep with other women, had the concept of matrimonial fault on his side if his wife wished to terminate the relationship, or even worse,

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5 (1979) 144 CLR 513, 522.
6 (1981) 48 FLR 328, 329.
7 Hogan J. in *Steinmetz and Steinmetz* (1980) FLC 90-801, and Simpson J. in *Rouse and Rouse* (1981) 7 Fam L R 780, 785.
8 (1981) 7 Fam L N No. 22.

sought solace with another man. The same applied to the woman who upon her return to the workforce, found that she had outgrown intellectually the boyfriend of her late teenage years. Such women left "without cause" and the husband could treat her as the deserter or the adultress with dire consequences as regards property, maintenance and custody.[9] Recent research has shown that about 65% of separations are initiated by women, and that in many of those cases the men had little or no inkling that anything was amiss with their marriages.[10]

It is noteworthy that in the few cases since the coming into force of the Family Law Act where judges gave weight to allegations of matrimonial misconduct it was the woman who suffered in consequence even though in all cases the husband's conduct fell far short of perfection.

In *Issom and Issom*[11] the wife had fallen in love with a Finn whilst her husband was stationed abroad. Fogarty J. found that the husband had had ten different postings in twelve years of marriage and that the wife had not been enthusiastic about the latest posting. He found that this and the three young children of the marriage "were starting to exert real pressures on the wife". It would seem that the husband himself had had several extra-marital affairs over the years. Despite this his Honour took a severe view of the wife leaving the husband and the children and accompanying her lover to Finland. After some six months she returned to Australia pregnant by her lover and destitute. She applied for the custody of the children and maintenance. Fogarty J. denied her both.

As regards her claim for custody he said:

> [i]t may be said in this case that her virtual abandonment of her children and her preference of Ericsson to her children displayed a significant blemish of character as a custodian which is important to consider . . . however I find it unnecessary to found my decision in this case upon that consideration.[12]

Instead he stressed the fact that the husband had "manfully risen" to the task of looking after the children with no assistance from the wife.

In respect to the claim for maintenance, his Honour referred to the remarks of Lord Denning M.R. in *Wachtel* v. *Wachtel*,[13] that matrimonial misconduct which was "obvious and gross" should be taken into account. Although unlike the English legislation,[14] no specific reference to conduct appears in section 75(2), he found in paragraph (o) of that section warrant

9 *E.g. Priest* v. *Priest* (1963) 9 FLR 384 (custody); *Adams* v. *Adams* (1968) 11 FLR 197, 200-201 *per* Begg J. (maintenance).

10 See the results of the Family Dissolution and Reformation Study published in *1982-3 Annual Report* of the Institute of Family Studies, pp.34-39. At pp.34, 35 both men and women interviewed after divorce agreed that in over 60% of cases the woman had been the initiator of the separation. In 13% of cases the men had no idea that anything was wrong with the marriage. It is also interesting to note at p.36 that: "[s]pecific faults in the former spouse's personality was a common response given, and largely a female response. Violent behaviour, drinking and gambling were the major faults mentioned."

11 Reported in (1977) FLC 90-238, but decided in April 1976.

12 *Id.*, 76,289.

13 [1973] Fam 72, 90.

14 Matrimonial Causes Act 1973 (Eng.) s.25(1).

for a similar approach under the Act which led him to deny maintenance to the wife on the ground that she was "guilty of . . . significant conduct which brought about the destruction of the marriage."[15]

It should be pointed out that these views in a judgment given in April 1976, a few months after the Act came into force, are no longer held by either the Court or his Honour. This writer himself shared the view expressed by his Honour at the time that the remarks of Lord Denning were apposite to the Australian Act,[16] a view since rejected by the Full Court in *Soblusky and Soblusky*.[17]

By the time that a somewhat similar custodial situation came to be decided by me in *Chandler and Chandler*,[18] I felt sufficiently emboldened by the changed climate to refuse to hear allegations that the wife had deserted the husband for another man and that the husband had been guilty of violence towards the wife. That refusal has been criticised by Mr Lehmann who argues that "[i]t is relevant for a court to attempt some assessment of the relative stability of parents and obviously some knowledge of their past actions is necessary for a court to determine how they are likely to behave in the future."[19] The difficulty with any enquiry into "stability" is that it leads one back to the old double standard where the adulterous or violent male is seen as more 'stable' than the 'unnatural' mother who leaves her children. An inquest into the cause of the wife leaving would not only add considerable cost to litigation, it would also very often be inconclusive.

Matrimonial fault was also for some time seen as relevant in relation to applications for exclusive occupation. In *Rowe and Rowe*[20] the majority of the Full Court (Pawley and Wood JJ; Evatt C.J. dissenting) took the view that a wife who had left the former matrimonial home standing exclusively in the name of the husband, without "proper cause to do so by reason of the conduct of her husband" could not claim to be entitled to exclusive occupation even though she had the care and control of the children of the marriage. The wife stated that she had left because she felt insecure, left out of her husband's financial affairs and had been threatened by him if she left. However, none of this would have given her cause for leaving under the old law of constructive desertion and hence as a 'deserter' herself she was held not to qualify for relief even though the need of her and the children for the premises was the greater. The decision has since been reversed by another Full Court in *Davis and Davis*,[21] but it illustrates the risk to women involved in the fault concept.

In *Smythe and Smythe*[22] the Full Court upheld an appeal by a wife from

15 Note 11 *supra*, 76,292.
16 P. E. Nygh, *Guide to the Family Law Act 1976* (1st ed. 1975) 106.
17 (1976) FLC 90-124.
18 (1981) FLC 91-008.
19 G. Lehmann, "Legal Craftsmanship in Custody Cases or a Joint Custody Presumption" (1984) 14 *MULR* 442, 450.
20 (1980) FLC 90-895.
21 (1983) FLC 91-319.
22 (1983) FLC 91-337.

the decision of Wood J. denying her custody on the ground that she had not given a satisfactory explanation why she had left the matrimonial home despite the fact that the husband had a drinking problem and the wife had been unhappy in the house they were living in. The case appears to fit the pattern referred to in the research project above, for the husband testified that the wife's removal of her belongings from the joint bedroom was to him the first indication that all was not well. The Full Court by majority (Evatt C.J. and Asche J; Gee J. dissenting) held that the trial judge had erred in treating the conduct of the wife as a relevant consideration where it had no bearing on the fitness of the wife as a parent.

In each of these cases there was evidence of a breakdown in relations prior to the departure of the wife or at the very least a lack of communication on the part of the husband. Nevertheless in each case, it was the wife's act of leaving, with or without the children, which was seen as matrimonial fault disqualifying her from relief.

The only type of woman who may benefit from the retention of fault is the middle-aged or older lady for whom marriage is a career and whose husband has reached a station in life where he can afford to support her in the manner to which she has grown accustomed. If the husband had left her "without cause" she could demand to be compensated for the loss of her career as a married woman and might expect to receive for the remainder of her life the use and occupation of the former matrimonial home together with lifetime maintenance.[23] But this was only a small group; younger deserted wives have little to expect from their husbands and, in any event, as shown earlier, women who allow their husbands to take the initiative in leaving an unsatisfactory marriage are now in the minority. The abolition of fault is therefore of benefit to most women, despite the cliche of the 45-year old roue who leaves his wife of long standing for the 20-year old secretary.

III. CUSTODY AND ACCESS

There is little doubt that the large majority of children will finish up in the custody of their natural mothers after separation. The figures presented by Horwill and Bordow[24] indicate that in 1980 of all orders made, including consent orders, in the Melbourne Registry 79% vested the sole custody in the mother.[25] In defended custody cases, which account for some 10% of the total, fathers obtained sole custody in 31% of cases.[26] If account is taken of 'split' decisions where the children were divided between the parties, or joint custody orders were made, care and control (now custody) of at least one child of the family was awarded to the father in 44% of cases.

These figures show that the mother preference is still alive and well in the

23 See *Davis* v. *Davis* (1963) 5 FLR 398, 403 *per* Barry J.

24 F.M. Horwill and A.M. Bordow, *Research Report No 4: The Outcome of Defended Cases in the Family Court of Australia*, 1983.

25 *Id.*, 29.

26 *Id.*, 30.

general community, the fathers generally not contesting custody. The fact that fathers do appreciably better in contested cases, does not mean, of course, that if only more fathers were encouraged to stand up for their rights, more would gain custody. The figures suggest that relatively few fathers are interested in custody. The figures do not suggest how many successful fathers will personally undertake the caring responsibility and how many delegate that function to relatives, de factos, new spouses or hired help.

Leaving that aside, the bias which still exists in favour of mothers even in contested cases, is not in my view based on any remaining sentimental notion of motherhood, or even the idea of psychological bonding which has been criticised by Mr Lehmann[27] as a modern substitute for the old motherhood myth. It reflects the fact that the woman even today is more frequently willing to fulfil the role of full-time or substantially full-time parent.[28] The figures presented by Horwill and Bordow also indicate that the status quo is an important consideration which in most cases is affirmed by the decision. If a change is made, a change from the father to the mother is much more likely (47.5%), than the reverse (22%).[29]

Although many of the complaints about discrimination have come from male groups, there have been some complaints that male judges have discriminated against women seeking custody by discounting their credibility. As Dr Scutt writes in her book *Even in the Best of Homes:*

> [w]omen divorcing because they did not wish their children to suffer from continuing violence were often surprised that custody was awarded to the abusive husband, or that access was allowed despite abuse of the children when they were living as a family.[30]

Dr Scutt ascribes this to "patriarchal values" which "provide foundation for the family jurisdiction."[31] The evidence she presents in support of this proposition is anecdotal based on the case histories selected by her of women who had the misfortune of losing child custody proceedings.

This is not to deny that the "patriarchal values" to which she refers did in fact exist and, as the preceding section illustrates, survived to some extent the introduction of the Act. But the figures referred to earlier, hardly support her charge of a pervasive bias towards husbands in contested custody proceedings. They may indeed suggest discrimination against women: but it is the structural discrimination in our society which treats women as the child-rearers. This is not what Dr Scutt is complaining about.

The "patriarchal values" tend to portray motherhood as pure and noble with the degree of devotion and self-sacrifice which Glass J.A. spoke about so eloquently.[32] There is a strong argument that judges holding such views would treat with suspicion, if not repugnance, any woman who pursued a career outside the home, who left the home without the children, or whose

27 G. Lehmann, "The Case for Joint Custody" (June 1983) *Quadrant* 60, 63.
28 See *In the Marriage of Sanders* (1976) 1 Fam L R 11,433, 11,441 *per* Evatt C.J. and Watson J.
29 Note 24 *supra*, Table 19.
30 J. Scutt, *Even in the Best of Homes* (1983) 253.
31 *Id.*, 257.
32 Note 4 *supra*.

sexual life was unorthodox.

Strangely, little protest has been heard from career women. Horwill and Bordow[33] conclude that there is no significant relationship shown in the statistics whether or not the mother was in full-time or in part-time employment. It would seem that being a "working woman" is not a disabling factor.

Nor do the statistics show that a woman who leaves her children behind is thereby disabled. There is no longer any rule that this precludes any claim on her part.[34] The maintenance of the status quo is an important part of the custody determination, but generally speaking, it works more strongly in favour of the mother than the father. Horwill and Bordow[35] show that mothers are more likely than fathers to retain the custody of children in contested cases, or conversely that only a minority of fathers (48%) is successful in retaining custody.

The argument that traditionalist judges will judge sexual unorthodoxy in females more harshly than in males certainly has merit.[36] Some traces of this approach can be seen even after the Family Law Act came into force.[37] The issue of homosexuality has also been seen mainly as the issue of the lesbian mother.[38] In some cases custody has been awarded to mothers subject to conditions which could be seen as demeaning.[39]

Today courts have begun to realise that sexual behaviour of any kind, unless it is likely to result in direct harm to the child through neglect or molestation, is not as relevant a consideration as the capacity to care for the child.[40] The imposition of conditions on homosexual parents was abandoned by Ross-Jones J. in *Shepherd and Shepherd* as "largely illogical".[41] Although that case involved the award of custody to a homosexual father, nothing in his Honour's reasoning suggests that he took a more lenient view because the applicant was a male. It is interesting to note that since then the issue of homosexuality has largely disappeared from the reported cases.[42]

The alleged right of the non-custodial father to access has been seen by some as the last vestige of his ancient common law right to the possession of the child. The decision of the New South Wales Court of Appeal in *Cooper* v. *Cooper*,[43] was for long seen as the starting point in relation to access. In that case the wife had made allegations of violence and ill-treatment by the husband, not only against herself, but also against the older child of the

33 Note 24 *supra*, 35.
34 *Chandler and Chandler*, note 18 *supra; Smythe and Smythe*, note 22 *supra*.
35 Note 24 *supra*, 34.
36 C. Smart, *The Ties that Bind* (1984) 45.
37 *In the Marriage of Lonard (No. 2)* (1977) 2 Fam L R 11,657, 11,658 *per* Hogan J.
38 *In the Marriage of Spry* (1977) 3 Fam L R 11,330; *In the Marriage of Schmidt* (1979) 5 Fam L R 421.
39 *In the Marriage of Brook* (1977) 3 Fam L N No. 81; see E. Goodman, "Homosexuality of a Parent; A New Issue in Custody Disputes" (1979) 5 *Monash U L R* 805.
40 *In the Marriage of D.K.I. and O.B.I.* (1979) 5 Fam L R 223.
41 (1979) FLC 90-729, 78,933.
42 The exception is *In the Marriage of L* [1983] FLC 91-353 which illustrates the acceptance.
43 (1976) 11 ALR 295.

marriage, a boy, whom the father had abducted and kept interstate for some years. The husband was described as "lacking in any settled purpose and unstable in character". Nevertheless the Court of Appeal held that the trial judge had wrongly dismissed the husband's application for access. Samuels J.A. said:

> I approach the matter on this basis. First, the paramount consideration is the welfare of the children. Secondly, prima facie the interests of the children would require that both parents have an opportunity to maintain some communication with them and to play some role in their education and general training for adult life. Thirdly, the interests of the parent seeking access are relevant and are not to be ignored. Fourthly, to deny access to any parent is a serious step, which may well have grave consequences for the child's future development. Hence, fifthly, an order denying access will be made only in exceptional cases and upon solid grounds.[44]

A similar statement was made by Fogarty J. in the Full Court of the Family Court in *Horman and Horman*.[45] However, more recently the Family Court has come to realise that the so-called right of a father is in reality an interest of the child to have a meaningful relationship with both natural parents if this is both feasible and likely to be beneficial. That policy was explained by Treyvaud J. in *Re A*:

> I consider that the principle applicable can be stated quite simply, namely that access by a non-custodial parent will only be ordered where access will advance and promote the welfare of a child. Usually a child does benefit in having contact with and developing an on-going relationship with the non-custodial parent. Usually, and perhaps often, a child wishes more contact with the non-custodial parent. Usually contact with the non-custodial parent does no harm to the relationship between the child and the custodial parent. However, where the usual situation does not apply and there is no evidence that the children's welfare will be advanced by access, then access should be refused.[46]

Denial of access may therefore occur not only because of the father's alleged misdoings, but also where the child for no ostensible offence given by the father has formed a deep-seated antipathy towards him, even if that antipathy is caused by a desire to identify with a mother's emotional hostility towards the father for reasons which have nothing to do with the welfare of the children.[47] Thus the paternal right no longer exists, even if courts are still reluctant to face the dilemma of choosing between a father against whom nothing adverse can be said, so far as the child is concerned, and a mother with unresolved feelings of hostility and humiliation arising out of the breakup of the marriage. That dilemma can only be resolved by adopting the view advocated by Goldstein, Freud and Solnit in *Beyond the Best Interests of the Child*,[48] that the availability of access should be left to the sole determination of the custodial parent. This is a view which the Family Court so far has not been prepared to accept and which I should not be taken to advocate here. As the law now stands it is for the court, and not the

44 *Id.*, 298.
45 (1976) FLC 90-024.
46 (1982) FLC 91-284, 77,612. See also my own similar comments in *Cotton and Cotton* (1983) FLC 91-330, 78,252.
47 *Re K* (1982) FLC 91-283, 77,610.
48 J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child* (1973) 37-39.

custodian, to determine whether there is any benefit to the child in continuing an association with the other parent.

A counter-proposal has been made by Mr Lehmann[49] that the difficulties concerning access now experienced by the Family Court could be overcome through a more determined application of the idea of joint custody on the Californian Model. Section 4600.5(a) of the Californian Civil Code provides for a presumption that joint custody is in the best interests of the child where both parties agree to an award of joint custody, thereby, it would seem, relieving the court from the duty to make further enquiries. There is, it would seem, no such presumption in the case of contest.

"Joint custody" is defined in section 4600.5(c) of the Code as including both joint physical custody which is the equivalent of joint custody as now defined in section 60A(2) of the Family Law Act, and joint legal custody which is the equivalent of orders for joint guardianship to both parties and sole custody to one under the Act.

As regards the former which would involve the sharing of the physical care of the child on a time basis, such as half a week or weekdays and weekends about, this would undoubtedly be an ideal solution if the parties can operate it with mutual goodwill. It is not a solution which can be imposed on an unwilling party or parties who face each other with a certain degree of tension. The other solution of joint guardianship which means a sharing of the responsibility to make decisions for the long term welfare of the child, but which leaves the day to day care firmly in the hands of the custodial parent,[50] has been described by Ms Carol Smart as an attempt "to restore to the father certain legal rights in the form of joint custody orders which would preserve his authority over the family after divorce, but which would not require him to undertake any of the disadvantages, save a narrow financial one."[51]

Hence what is seen by male publicists such as Mr Lehmann as a solution to restore the interest and dignity of non-custodial fathers, is seen by feminist authors such as Ms Smart as 'reactionary'. There is some justification on either side. It is regrettably true that some men seek through joint custodial arrangements to continue to exercise control not only over their children but also over their former wives, particularly in matters of education and religious upbringing.[52] Of course, for many men who seek to control life after divorce, formal orders are not necessary, more often "the power of the purse" will achieve their object.

What may be reactionary in the hands of some, can be progressive in the hands of others. A father genuinely concerned with the welfare of the children and able to work co-operatively with the mother without seeking to dominate her, can add meaning to the trite saying that spouses can divorce each other but they cannot be divorced from their children. A sensitive court

49 Note 19 *supra*, 456-460.
50 S. 60A(1).
51 Note 36 *supra*, 139.
52 See, for a striking example, *Kennard* v. *Kennard* (1979) 34 FLR 525.

assisted by less overburdened counsellors could no doubt learn to separate the would-be dominant fathers from the co-operators and, if need be, take the time and effort to educate the parties towards co-operation. Joint custody therefore is certainly the ideal solution. Like many ideals it is abused in practice. But this is not a reason for ceasing to pursue it.

IV. PROPERTY

In property matters married women have long been at a disadvantage. Judges in the past tended to value the financial contribution made by the breadwinner directly to the acquisition of property more highly than the contribution of the wife as homemaker and parent, or even a contribution from her own earnings to the household expenses.[53]

The Family Law Act set about to rectify this deficiency by referring expressly in section 79(4)(b), as first enacted, to "any contribution made in the capacity of homemaker and parent" to the acquisition, preservation and maintenance of property. This language could be interpreted as restricting the wife's claim to the former matrimonial home to the exclusion of business assets.[54] To remove doubts, the Act was amended in 1983 to direct the Court's attention in section 79(4)(c) to:

> the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent.

The problem is to compare the directly measurable financial contribution of the principal breadwinner to the intangible contribution of the homemaker and parent. To solve this problem, the Family Court from 1977 onwards developed the idea of the essential equivalence of the economic and domestic contributions. This found its origin in the remarks made by Evatt C.J. in *In the Marriage of Rolfe*:

> [t]he purpose of s.79(4)(b), in my opinion, is to ensure just and equitable treatment of the wife who has not earned income during the marriage, but who has contributed as a home-maker and parent to the property. A husband and father is free to earn income, purchase property and pay off the mortgage so long as his wife assumes the responsibility for the home and the children. Because of that responsibility she may earn no income or have only small earnings, but provided she makes her contribution to the home and to the family the Act clearly intends that her contribution should be recognised not in a token way but in a substantial way. While the parties reside together, the one earning and the other fulfilling responsibilities in the home, there is no reason to attach greater value to the contribution of one than to that of the other. This is the way they arrange their affairs and the contribution of each should be given equal value.[55]

From this premise has developed the principle that equality should be the presumed starting point not only in respect of the matrimonial home but all assets including those built up by the breadwinner through economic activity

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53 *E.g*. *Robinson* v. *Robinson* [1961] WAR 56.

54 *In the Marriage of Rowan* (1977) 3 Fam L N No. 76.

55 (1977) 25 ALR 217, 219.

outside the home.[56]

The presumption of equality was rejected by the High Court in *In the Marriage of Mallet*,[57] on the undoubtedly correct basis that there was no rule of equality of division to be found in the Act. But their Honours did not reject the principle of equivalence of contribution. As Wilson J. stated: "However, 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".[58]

The point therefore is that a good homemaker and parent equals a good breadwinner. There is no primacy in the cash contribution. What the majority of the High Court found objectionable was the presumption that in the absence of evidence detracting from the performance of homemaker and breadwinner respectively, there should be an assumption that each side did his or her best. Instead as Wilson J. pointed out,[59] there should be an enquiry into the quality of the performance in each case. A detailed investigation, as Wilson J. seems to envisage, would no doubt put the housewife at a disadvantage since a contribution in money is much easier demonstrated than a contribution as homemaker and parent which may be denigrated by the one party in a position to corroborate it. Nevertheless a majority of the Court[60] did not preclude a conclusion that equality of division was the proper result in most cases, at least where no extensive business assets were involved.[61] The partnership concept whereby the party fulfilling the role of homemaker and parent shares in the goods acquired by the breadwinner outside the home, was expressly acknowledged by Mason, Deane and Dawson JJ.[62] Only Gibbs C.J. appears to be somewhat dubious,[63] but he was not prepared to interfere with the finding of the trial judge giving the wife a share in the business assets.

Where, however, Deane J. differs from Mason and Dawson JJ. is the extent of the partnership. Both justices would be happy to apply it to the core of the matrimonial assets, such as the former matrimonial home and chattels and savings, such as superannuation, derived from the husband's earnings as an employee. But they would give the wife only limited credit in relation to a business built up entirely through the skills of the husband with little direct involvement by the wife.[64]

This poses indeed a dilemma: if the non-participating housewife is entitled to an equal share, what is the entitlement of the wife who is a real partner in

56 *In the Marriage of Wardman and Hudson* (1978) 5 Fam L R 889, 894 *per* Watson, Wood and Fogarty JJ.
57 (1984) 52 ALR 193, 196 *per* Gibbs C.J., 209 *per* Mason J., 218 *per* Wilson J., and 227 *per* Dawson J.
58 *Id.*, 218. Similar remarks were made by Mason J., *id.*, 209.
59 *Id.*, 218.
60 *Id.*, 209 *per* Mason J., 221 *per* Deane J., 227 *per* Dawson J.
61 *Id.*, 209 *per* Mason J., 227 *per* Dawson J.
62 *Id.*, 207 *per* Mason J., 222 *per* Deane J., 227 *per* Dawson J.
63 *Id.*, 196.
64 *Id.*, 209 *per* Mason J., 227 *per* Dawson J.

the business, be it a commercial enterprise, a corner store or a farm? In *In the Marriage of Zdravkovic*[65] the Full Court (Pawley, Strauss and Treyvaud JJ.) held that there is no rule that there should be an extra loading if "a wife makes a financial contribution as well as domestic ones". This rule would no doubt have applied also if the wife had contributed her unpaid or underpaid labour to the business.

Such a rule would seem unfair to the working wife, be it within or without the husband's business. The detailed contribution test adopted especially by Wilson J. would overcome that problem to a certain extent: on that basis the wife who works in the business should receive a larger proportion than the 'pure' housewife. On the other hand the partnership concept adopted by Deane J. would proceed on the basis that the parties as partners have divided their tasks: if the husband wants the wife to stay at home and look after the children, he cannot accuse her of not having pulled her weight in the partnership.

The mixed partnership/contribution approach of Mason and Deane JJ. would, like Wilson J., require a contribution beyond the home before awarding a sizeable share of the business assets to the wife, but unlike Wilson J. presumably, would not look too closely at the division of labour in the home.

Without a direction from Parliament, it would seem, with respect, that the Court could not go much beyond the approach taken by Mason and Deane JJ. A system of community property cannot be created by the judiciary and as long as contribution remains the statutory criterion, it must be applied in the manner suggested by the majority in *Mallet*. In so far as business activity is still largely a male prerogative in Australia, the result may be unfair to women, albeit mainly the wives of the well-to-do, but this is a structural rather than a legal discrimination.

For some time the heresy flourished in some quarters that orders should not be made which would deprive a breadwinner of an asset, usually a farm, which provided him with a livelihood. This view was well expressed by Demack J. in *In the Marriage of Scott:*

> [i]n my view land which is used for farming purposes and which is essential to the production of an income is in quite a different category from land which simply provides a place for the family home. If the continued availability of land is essential to one spouse as a place on which to work and produce income, in my opinion, any property order affecting such land should not affect its production capacity or seriously reduce its income-producing potential.[66]

This statement was approved by the Full Court in *Smyth and Smyth*,[67] although it was found on the facts of that case that the order made by the trial judge did not affect the viability of the farm. This approach could operate most unfairly against the estranged wives of farmers, who ironically usually make a much more direct contribution to the family business than

65 (1982) 8 Fam L R 97, 103.
66 (1977) 29 FLR 204, 206.
67 (1977) FLC 90-283.

most suburban wives. In the case of a farmer who is rich in assets, but poor in liquidity, the application of this principle has led to some very meagre awards on the basis that the husband could not afford to pay off a large mortgage and should not be compelled to sell.

Any idea that farming cases were different from other cases was dispelled by the Full Court in *Magas and Magas* where Asche J. said:

> [i]f arrangements can be made which would relieve the spouse who is working the farm as a farmer, from selling the farm but at the same time doing proper justice to the claim of the spouse who is not living on the farm, then of course those arrangements should be made.

However, his Honour then went on to say:

> [i]f there is no other way to do that which is just and equitable then a sale must take place. It becomes an incident of the sad fact that, when two people separate, property which might have given them together a reasonable competence will not be sufficient for each when divided. That is an inescapable situation and cannot be used as an argument to deprive one party of that to which he or she is otherwise properly entitled.[68]

Another heresy which flourished for a while in the Northern Territory and Western Australia, areas where men had made large fortunes out of land development or mining in a relatively short time, was that a wife of a wealthy husband should receive only what she needed to maintain an adequate lifestyle rather than have her interest in the husband's wealth calculated by reference to contribution. This approach was quite firmly rebuffed by the Full Court in *Pastrikos and Pastrikos*[69] and *Albany and Albany*.[70]

Although the Family Court can and does intervene in situations where the trial judge has openly applied an incorrect principle, the decision of the High Court in *Mallet* has tied the hands of the Full Court to a certain extent. In stressing that the Full Court should respect the discretion of the trial judge,[71] the High Court has left him with a good deal of discretion in which some judges may value the contribution of the homemaker and parent more highly than others leaving a possible range of between one third to two thirds of the joint assets of the parties.

The "wilderness of single instances" so aptly referred to by Deane J. in *Mallet*,[72] therefore has its own potential for injustice to women, and sometimes to men as well. For that reason Dr Scutt and Ms Graham have proposed a system of community property which certainly would remove the risk of arbitrariness.[73] But it would not necessarily be fair.

The well-known study by L. Weitzman[74] has shown that in California under a law which requires equal division of matrimonial assets upon

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68 (1980) FLC 90-885, 75,591.

69 (1980) FLC 90-897.

70 (1980) FLC 90-905.

71 Note 57 *supra*, 200-201 *per* Gibbs C.J., 206-207 *per* Mason J., 219 *per* Wilson J.

72 *Id.*, 222 (From *Aylmer's Field* by Alfred, Lord Tennyson).

73 J. Scutt and D. Graham, note 1 *supra* .

74 L. Weitzman, "The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards" (1981) 28 *UCLA L Rev* 1181.

divorce, one year after the divorce women tend to be in a worse position than the men in terms of disposable income. This is also likely to be the experience in Australia.

In the first place the earning capacity of men, despite the introduction of the principle of equal pay, still tends to be higher than that of women. Even where both parties are free to enter into full-time outside employment, the men tend to hold the better paid positions. But, of course, a large number of married women are not free to enter into full-time paid employment.

Secondly, as we have seen, women tend to be left with the burden of housing and caring for children. Recent studies by the Institute of Family Studies[75] indicate that the weekly cost of bringing up children far exceeds the average order for maintenance. It is also a sad fact that many orders for maintenance are not obeyed even where the husband is able to pay. Thus the husband who transfers the entire equity in the former matrimonial home to the wife, subject to the existing mortgage, often on the understanding that she will not claim child maintenance, may at first sight appear to be very generous, but he has freed himself of the burden of outgoings on the house and effectively transferred the cost of feeding and housing the children to his wife and/or the taxpayer. Whether he is a blue-collar worker or a professional man, his disposable income rises considerably, and it is not surprising to see often that after a few years of separation he has invested in a new home though subject no doubt to a hefty mortgage.

However, in most cases the husband is not obliged to transfer his interest in the former matrimonial home to the wife free of any consideration. The Full Court has held in *Vaughan and Vaughan*[76] that it is unjust to deprive a husband of the fruits of his labour and hence he should receive some return for his capital investment in the house. The wife who buys the husband out, albeit at a reduced price, is left then with a considerably larger debt than the husband with his stronger financial resources ever faced, a considerably smaller income and, even if she receives maintenance for the children, the bulk of the child expenses. If there is an order for the sale and division of the house, which gives each party a reduced capital asset, the wife even if she gets more than one half, is left with a reduced earning and hence borrowing capacity.

The interesting study by Ms Martha Fineman of the so-called Wisconsin Model,[77] shows that a model not unlike that which existed in Australia before *Mallet*, namely a presumption of equality of division with a power to adjust with respect to such matters as length of marriage and need, generally operates conservatively with minor adjustments made of an average of 10%.

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75 K. Lovering, in *Cost of Children in Australia, Working Paper No 8*, Institute of Family Studies, August 1984, calculates an average of $40 per week for primary school age children and $50 per week for secondary school age children. The average maintenance order is now $30 per week.

76 (1981) FLC 91-066.

77 M. Fineman, "Implementing Equality: Ideology, Contradiction and Social Change" (1983) *Wis L Rev* 789.

This accords with the assumption so often seen in Australia in relation to section 87 agreements that a division of the net proceeds of sale of the former matrimonial home of 60% to the wife with children and 40% to the husband is fair and equitable. And indeed it would be difficult at the moment to argue otherwise given the constraints of statutory and decisional law.

V. CONCLUSION

It may be too crude to say that generally speaking the women finish up with the children and the men with the property. Certainly most women willingly undertake the rearing of the children even after separation and thereby condemn themselves to a life of relative poverty. The men do not retain all the property and sometimes part with the bulk of existing assets. But they retain and often increase their capacity to earn and dispose of income. They also retain the benefits of future property such as superannuation, which the divorced wife loses the benefit of and for which she cannot be adequately recompensed, at least when retirement is still some time away.[78]

The removal of the disadvantages presently incumbent on married women is not a matter for the law alone. The law cannot remove the stereotyping of roles which allows the man effectively to abandon responsibility for his children and yet retain his self esteem and that of his mates, whilst branding as 'unnatural' the woman who does so. Nor can the law by itself remove the bitterness and feeling of inadequacy caused by a failed marriage which may impel women to drive their former husbands away, so that abandonment of responsibility becomes the easier option.

Assuming that the present societal conditions continue for the foreseeable future, the law can do more to ensure that women, especially those with children, are not left without sustenance. Certainly as Ms Eva Cox has advocated,[79] greater stress should be placed on the future inequality in earning capacity between the parties. The Act should be amended to ensure that this is not done in a token fashion as at present, but in a realistic manner.

However we would delude ourselves if we thought that was the final solution. The problem is that in many cases the wealth of the husband lies in his earning capacity, fringe benefits and superannuation rights. Even the transfer of the entire equity in the former matrimonial home to the wife would not save her, as we have seen, from a life of relative poverty.

The only means whereby a wife-custodian with limited employment opportunity can be effectively assisted is by a continuing transfer of income through adequate and effective maintenance. At present the collection of

78 *Prestwich and Prestwich* (1984) FLC 91-569.

79 E. Cox, "Beyond Community of Property – A Plea for Equity" (1983) 18 *AJ Soc Iss* 142, 144-145.

maintenance in most of Australia leaves much to be desired and proposals for improvement[80] involve a heavy capital investment from governments which are anxious to reduce their expenditures.

The other solution is to let the government take over the burden of wife and child support at the cost of the general taxpayer. This is, of course, already largely the case. The government could no doubt recoup itself from the incomes of the persons liable to pay maintenance. The irony is that the skills required to evade the payment of maintenance are largely similar to those required for the evasion or avoidance of income tax. Hence the burden will once again be borne by those who will not, or cannot, escape their obligations, to the benefit of those who do and can.

Nevertheless I see very little alternative to a scheme which combines some elements of the schemes outlined above. In the first instance there should be a division of the assets acquired jointly during the marriage, on the basis of equality, or such other basis as the parties may have mutually agreed upon. In the second place that capital payment should be supplemented, wherever possible, by a capital payment to compensate a party who has lost out in his or her place in the workforce by reason of the marriage in comparison to the other party with a view to restoring the position of that party as much as possible. That capital payment should be calculated without reference to any question of re-marriage, unless it is clear at the time of the hearing that the applicant does not intend to re-enter the general labour market.

The payment of continuing spouse maintenance and its consequent creation of a class of dependent women is to be avoided, but if there are insufficient assets to make the compensation payment, maintenance should be ordered, not indefinitely as in the past, but for a reasonable period, such as three years, to enable the economically disadvantaged partner to look after young children and to re-enter the workforce.[81] Subject to the other party's ability to pay, that could include the cost of retraining, in so far as it is not covered by any government scheme.

In any event there ought to be realistic orders for the maintenance of children. In both cases the payment of maintenance should be guaranteed and enforced by a government agency. The mere fact that the burden of enforcement of maintenance orders will not fall on an impoverished woman, but will be carried out at public expense should result in a dramatic improvement in the level of compliance, although no doubt there will remain a hard core of persistent refusers. But in the final analysis the discrimination against women will only be overcome by their gaining of economic equality.

The Family Court is an institution of the society which it serves. Whilst it

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80 *The Report of the National Maintenance Inquiry*, initiated by the Commonwealth Attorney-General's Department, AGPS, 1984, concludes at para.1.53 that: "[i]f a respondent is sufficiently determined, the payment of maintenance can be made a voluntary act." It recommends the setting up of a single national maintenance agency at a cost of approximately $2 million to establish and $13 million annually to operate.

81 See De Facto Relationships Act 1984 (N.S.W.) ss 27(1)(a) and (b), and 30(1) and (2).

should not be seen to be applying "patriarchal values", neither can it take the initiative in effecting social reform. That responsibility lies with the legislature. Once the legislature has given a clear lead, it is the function of the judges to implement it.