Resolving Property Disputes - An Anglo-Australian Contrast

presented by

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for

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Introduction

The advertised title of today's paper has the grand title of "Family Law – the Future". Much as we are tempted to produce a crystal-ball and tell all of you your fortunes, this paper addresses the subject of resolving matrimonial property disputes. We might have sub-titled this paper "Resolving Property Disputes – an Anglo-Australian Contrast", because it canvasses recent developments in this area of law in Australia and also in England and Wales.

My co –author Rebecca Wood is a member of the English Bar who has come to Australia as part of the Pegasus Scholarship Trust scheme, which is a creature of the English Inns of Court and provides for young Commonwealth lawyers to gain some experience in another jurisdiction. She is working with me as my legal associate pursuant to this scheme for a three month period and I have taken advantage of this resource and drawn upon her knowledge to be able to tell you a little of how the English courts are operating in this area.

You might be interested to know for the future, that the Pegasus scheme allows for young barristers to be placed with practitioners, as well as with a court, and the scholarship award covers the costs. Family law placements are still relatively rare, so if there are any practitioners who might be interested in taking someone, such interest would be very welcome and my chambers can provide you with contact details.

Parameters of this Paper

The aim of today's paper is to focus on <u>recent</u> issues and developments in relation to the determination of property disputes. In August of this year, the Full Court of the Family Court of Australia published its judgment in the case of *Figgins and Figgins.*[1] We have no doubt that you are familiar with that case. It is only the latest chapter in the long story of how to give the trial judge hearing a contested property dispute guidance in how to apply the provisions of the *Family Law Act* 1975, without limiting the wide discretion that the Act

undoubtedly intends. We appreciate that this is a difficult area for practitioners advising their clients. Equally, the trial judges hearing such cases face a difficult task, taking into account the wide range of factors stipulated by the legislation, and ultimately to ensure the outcome is just and equitable.

Today we are thinking about the future and whether, in light of the recent decision in the case of *Figgins*, the position is clearer for practitioners and judges alike. Those of you who are familiar with the judgment in *Figgins* will know that the Full Court found some illumination from the approach of the courts in England and Wales to their equivalent legislation. We propose to look in some more detail at what has been happening in recent times in England.

Inevitably, the focus of our discussion will be on what we call the big-money cases, if only because the most recent developments have sprung from such cases. We should say from the outset that defining the parameters of this discussion in terms of the big-money cases does not come without its own controversy.

Even the question of defining what constitutes a big-money case is fraught with difficulty. A big-money case always means there is a lot of money. There is certainly always more money than the parties really need to meet their most urgent needs. Often a big-money case will involve a fortune that has been made during the lifetime of the marriage. Usually, it has been made in the marketplace by one party to the marriage – and it is usually the husband – whereas the other party – usually the wife - has primarily filled the role of homemaker. The nub of the issue then arises as to how we value the different roles played by the parties to the marriage when the financial market place values on one role so much more highly than the other.

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1 [2002] FamCA 688 available at http://www.familycourt.gov.au/judge/2002/pdf/figgins.pdf

It is inevitable that the big-money cases lead the way in shaping the law in this area.[2] These litigants have the wherewithal to litigate matters up to the level of the higher courts. The conundrum then follows: "To what extent do the principles enunciated in relation to 'big-money' cases apply to those cases where there is a very small asset pool?"

The legislation certainly does not stipulate that a distinction should be drawn between the different types of case on the basis of the amount of money available for distribution. Indeed, it would be quite wrong in any event for there to be one rule for the rich and one for the poor. However, as a matter of practical reality, the outcomes of cases necessarily depend upon the facts of each case. In the small-money cases, where the needs of the parties can often outweigh the resources, the nitty-gritty of the case is usually about these needs, rather than the more philosophical debate about entitlement that arises where there is more than enough to go around.

In this discussion, we propose to focus upon what are called the 'big-money' cases here and in England and Wales, mainly for the reason that these cases have in recent times been at the forefront of shaping the law in relation to the settlement of property on divorce.

Why an Anglo-Australian contrast?

Unlike some jurisdictions, such as New Zealand, or continental European regimes such as France, where the law prescribes a somewhat formulaic approach to the division of assets upon divorce, England and Australia have in common the wide discretionary approach. The respective statutes are similar. The English *Matrimonial Causes Act* was enacted in 1973. Hard on its heels came the Australian *Family Law Act* in 1975. It is interesting that New

2 Response of the Family Court of Australia to the discussion paper "Property and Family Law : Options for Change", July 1999 available at http://www.familycourt.gov.au/papers/html/propertysub.html noted at para 29: *" In reality, most of the cases that go to trial on contribution issues are cases where the facts are in dispute or it is claimed that there are contributions of such a character as to call for an outcome other than equality. For example,*

Zealand is now taking steps in the same direction. In a sense there is an irony about this as it is not very long since the Federal Attorney-General was promoting a more formulaic approach in Australia.

Under English Law, the courts are directed to consider all the circumstances of the case, with the first consideration being the welfare of any minor child of the family. The courts are then directed to consider the financial resources and the financial needs of the parties, the contributions each has made and will make in the future to the welfare of the family, the standard of living enjoyed during the marriage, the conduct of the parties, the age of the parties and the duration of the marriage and any disability suffered by either party. It is important to note the reference to needs, which does not appear in the Australian legislation.

The English Statute is not identical to the Australian *Family Law Act*. It is, however, sufficiently similar that it is not surprising to learn that, in recent years, our respective countries' case law has developed ever more hand-in-hand. In particular, on the question of how to deal with contributions, which has taxed the courts in both countries, each jurisdiction has benefited from some comparison with the other.

You may be interested to hear that as recently as last month, counsel in the Court of Appeal in England were making submissions on *Figgins* in a case called *Lambert –v- Lambert*, the most recent case in England where a higher court has considered the law in this area. We understand that the subject matter of this appeal was solely an argument about the current state of the case law in England, and in particular what the correct interpretation and application of the House of Lords' decision in a case called *White –v- White* is.[3] More of *White* later.

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substantially greater initial contributions, inheritances or other financial "windfalls" to one party, especially late in the marriage, or special skills of the type exemplified in cases such as Ferraro."

We had hoped that the Court of Appeal would have handed down its judgment in time to tell you about it today, but as yet it is not available. What the Court of Appeal makes of our judgment in *Figgins* remains to be seen, but so far as the argument from counsel was put, *Figgins* was used to help illuminate what the true state of the law is and should be in this arena.

The vexed question of contributions

We have said earlier in this paper that one of the problems facing the court in a property dispute is how to value the respective contributions of the parties and translate that into a financial award where the financial value society ascribes to the different roles played within marriage is so widely different. How do we put a price upon the homemaking skill, emotional and moral support and devotion to the upbringing of the children that the wife of a very successful business man brings to a marriage for twenty years? We will call this wife "Wife A". It is easy to see what value society has ascribed to the husband's contributions because we can look at his payslip and value his assets with precision. On the other hand, society values homemaking skills at the going rate for a nanny/housekeeper – so are Wife A's contributions worth only what it would have cost the husband to replace them, even assuming that were possible?

The problem is complex, though. What about "Wife B"? What value do we ascribe to the contributions of the wife of a very rich man who has three cooks, four cleaners and a gardener, who sits at home each day painting her toenails and, according to the husband, has undermined rather that supported him in building up his business? It is probably true in many cases that the wife of a rich man does not work as hard in the home as the wife of poor man, because the rich wife can afford domestic help aplenty. However, there may be considerable social demands made upon her and many absences during which she has to take responsibility for difficult family matters.

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3 [2001] 1 AC 596

And what of the case where the husband says that, not only has Wife C sat around all day painting her toenails and has never made a positive contribution to the welfare of the family, she has made a negative contribution. She spent the marriage having extra-marital affairs, which nearly destroyed the husband, she was always drunk when his business associates came to dinner and she had no interest in the children of the family, who were sent to live with their Grandmother in England because Wife C could not cope.

And Wife D, who has always worked full-time developing her own career as a lawyer. Wife D has worked hard all her married life, although she has never achieved the dizzy heights of financial success as has her husband. Can she assert full homemaking contributions? The reality probably is that she can, because research indicates that such women are usually called upon to perform the same homemaking and parental role as they would have if they had stayed at home.[4] However husbands rarely concede this in matrimonial proceedings.[5]

The most recent empirical findings by the Australian Institute of Family Studies on property division found:

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4 Women in Australia shoulder primary responsibility for domestic work and childcare. They spend more time doing it than men, even where both partners are employed: M. Bittman (1991) *Juggling Time: How Australian Families Use Their Time*, Office of the Status of Women, Department of the Prime Minister and Cabinet ; Australian Bureau of Statistics (1993) Women in Australia, Catalogue No 4113.0; and Australian Bureau of Statistics (1994) *How Australians Use Their Time*, Catalogue No 4153.0; Australian Bureau of Statistics (2000) *Australian Social Trends 2000*, Catalogue No 4102.0 and Australian Bureau of Statistics (1997) *Time Use Survey* Catalogue No 4150.0.

5 K. Funder 'His and Her Divorce' in P. McDonald (Ed.) (1986) *Settling Up - Property and Income Distribution on Divorce in Australia*, Australian Institute of Family Studies at 240 reported that: *"Women generally acknowledged their husbands' contributions, but men were likely to over-look their wives' earnings, while crediting them with most of the homemaking, which both the husband and the wife seemed to value less than earnings…"*. In *Ferraro and Ferraro* (1993) FLC 92-335, the Full Court said at page 79,572:
"The task of evaluating and comparing the parties' respective contributions where one party has exclusively been the breadwinner and the other exclusively the homemaker, is a most difficult one to perform because the evaluation and comparison cannot be conducted on a "level playing field". Firstly, it involves making a crucial comparison between fundamentally different activities, and a comparison between contributions to property and contributions to the welfare of the family. Secondly, whilst a breadwinner contribution can be objectively assessed by reference to such things as that party's employment record, income and the value of the assets acquired, an assessment of the quality of a homemaker contribution to the family is vulnerable to subjective value judgments as to what

> *"that non-financial contributions made to the non-basic assets of the marriage, particularly the domestic activities performed by the wife that frees the husband to work directly for financial reward, were under-valued or in some cases disregarded when the property was divided."*[6]

We would in any event sound a warning shot across the bows about the danger of descending into an analysis of contributions and engaging in a battle between spouses about them, as we have outlined. It would be invidious for the courts to undertake such an exercise and it is not hard to see that cases would descend to the old-days of the types of argument that were heard before the days of no-fault divorce.

In *Norbis v Norbis,*[7] Mason and Deane JJ pointed out that issues of establishing contributions are often barren issues because other factors become more significant. We think that it could be argued that the Full Court of the Family Court in cases like *Ferraro and Ferraro*,[8] *McLay and McLay*[9] and *JEL and DDF*[10] has gone too far in opening up the issue of so-called special contributions. In *Stay and Stay,*[11] (which was not followed by the Full Court in *JEL and DDF*) the Full Court attempted to place a brake upon the width of this principle. In *Figgins* the majority suggested that it was time that the issue was re-examined.

As we see it, the problem with this principle is that it is arguably based upon gendered concepts. It seems to involve a principle that in relation to marriages where a party (usually the husband) has made a lot of money, that this somehow requires an approach that gives the wife sufficient and allows him to keep the rest of it. Nowhere in the *Family Law Act* is there a reference to "special contributions or considerations".

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constitutes a competent homemaker and parent and cannot be readily equated to the value of assets acquired. This leads to a tendency to undervalue the homemaker role."

6 G. Sheehan and J. Hughes (2001) *Division of matrimonial property in Australia - Research Paper 25*, Australian Institute of Family Studies.

7 (1986) 161 CLR 513 at 524

8 (1993) FLC 92-335

9 (1996) FLC 92-667

10 (2001) FLC 93-075

It seems to us that, once the concept of "special", "stellar" or "exceptional" contributions enters the court's vocabulary, the door to an invidious analysis of contributions, of the kind we warn against, is necessarily opened. How else can the court assess whether or not a contribution qualifies for the pool of elite and favoured contributions that justify a higher award for a given party, without analysing its nature? And is that open door the same door that would lead the courts to more readily classify financial contributions as "special", because society as a whole tends to attach greater financial worth to financial contributions, and thereby introduce gender bias via the back door?

Recent Developments in the Australian Position

We turn from these vexed questions to look at the recent developments in Australia and in particular to the case of *Figgins*. The parties in that case cohabited for one year, and, after a gap, for another four years from 1993-1997. They were married in 1994. At the time of the hearing, they had one child aged five years. They started out their life together each earning modest salaries and with virtually no assets to speak of. Two weeks after the wedding, the husband's father and stepmother were both killed in a tragic accident. The husband and his sister each inherited one half of an asset pool worth AUD$28million, some of which was made up of the business interests in the Figgins Group.

Neither the husband nor the sister had any business experience and a Board of Management was formed to assist the husband and his sister in the running of the business. It remained active until 1997, at about the same time the husband and wife separated. The husband only acquired sufficient experience to take over the running of the Group in 1998. He also acquired his sister's interest in the business, borrowing about AUD$4.6million to do so.

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11 (1997) FLC 92-751

By the time of trial in 2001 the husband's agreed assets were AUD$22.5million, which represented an increase of at least AUD$8.5million or as much as AUD$13million, depending upon whether or not the loan to buy out his sister reduced his equity in the business or not (something which was unclear from the judgment of the Judge at first instance). Suffice it to say that, although he had received a generous inheritance in 1994, the husband's net worth had also increased significantly in the years that followed.

The trial judge awarded the wife AUD$1.1million. The wife appealed seeking AUD$2.5million. The majority of the Full Court upheld her appeal, re-exercised the discretion and awarded the wife the AUD$2.5million she had asked for. Ellis J, dissenting, would have awarded the wife AUD$2.35million. We think that those of you who are familiar with the judgments in *Figgins* will agree that, despite the existence of the dissenting judgment, there is much common ground between the majority judgment and the dissenting judgment.[12]

We do not propose to use this time today to delve any deeper into the minutiae of the case of *Figgins*. We would like instead to concentrate upon what we consider to be the wider impact of *Figgins* and the principles enunciated in the majority judgment in that case. We can summarise that impact in four points as follows:

1. The implications of the major themes discussed in *Figgins* and other big-money cases have wider implications and are influential beyond the big-money cases;
2. Equality is not a starting point for the assessment of contributions in Australian law and there are grave dangers in treated it as an end point of the analysis.
3. The objective of the law is to achieve a just and equitable outcome, which does not necessarily mean equality of division. However it does require an even handed approach as between the sexes;

4. Marriage is and should be a genuine partnership to which each party brings different gifts. To regard domestic contributions as inferior to financial contributions has no justification.

The facts of *Figgins* make it dissimilar in some ways to some other big-money cases that have led the development of the case law, such as the English case of *White*, because the way the assets were acquired and the relatively short period of the marriage was quite different. However, we consider that the guidance underpinning the approach set out in the majority judgment cannot be confined to such a narrow class of cases. The philosophy that applies to the way that courts and, inferentially, society as a whole, value the gifts that each party brings to a marriage must apply across the board. It is understood that even though the same philosophy applies, the outcome of a different case will be different because the facts are different. Such guidance does not usurp the trial judge's wide discretion in any given case.

You will see that the majority considered that the earlier cases of *JEL and DDF* and the minority view of Guest J in *Farmer and Bramley*[13] placed undue emphasis upon "special considerations" as we have discussed.

It might be said that we live in interesting times.

It has been difficult to assess so far what the impact of Figgins has been upon first instance cases. It is so recent that there are few judgments where it has been judicially considered. Boland J said in the case of *Gillespie and Gillespie*[14] that the principles in *Figgins* are not confined to cases concerning inheritance, but have a wider application. With that we would respectfully agree.

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12 Ellis J in *Figgins* at par 202 was of the view that, since neither counsel took up the Full Court's invitation to make submissions on the effect of *White*, he would leave an examination of the application of that decision in the Australian context for another occasion.

13 (2000) FLC 93-060

With that in mind, we would like to take you to a consideration of the position in England to see what light, if any, is shed by recent developments over there.

The English Position

Up until recently, the approach of the English courts to a claim by a wife – and it usually is a wife - for ancillary relief upon divorce has been to restrict her claim to what the court considered to be her "reasonable requirements". The court's consideration of a wife's needs predominated over a consideration of her entitlement. Furthermore, the courts considered the wife's needs to be what she needed simply to live out her days in a manner consistent with the lifestyle of the parties during the marriage. This philosophy underpinned the entire jurisdiction, with the result that, in cases where there was significant wealth, awards to wives represented only a tiny proportion of the overall asset pool. The effect was undoubtedly a large degree of gender bias, of the nature that the remarks in *Figgins*, we hope, help to avoid. The contributions of the male breadwinner were elevated to a superior position over and above what the female partner brought to the union. This was a somewhat condescending approach that paternalistically ensured that the wife was provided for, but at the same time robbed her of any entitlement that she could not justify by reference to her needs.

Then came the wind of change to the English court. On the very same day that the Full Court delivered judgment in *JEL and DDF*, the House of Lords handed down judgment in the case of *White*. That case is now the cornerstone of the way in which ancillary relief cases are decided in England.

Mr and Mrs White were dairy farmers from the South West corner of England. It was a long marriage (33 years) with children and it was accepted that Mrs White, particularly in the

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14 Unreported

early years, contributed to the running of the farm businesses. The total assets of the parties were valued in the region of £4million.

At first instance, the trial judge restricted Mrs White to her reasonable requirements. Mrs White appealed to the Court of Appeal and then to the House of Lords. She was finally awarded 40% of the matrimonial assets.

In the House of Lords, a number of guiding principles were enunciated that are of interest to Australian lawyers:

1. Their Lordships said that it was important to have guidance in relation to the English statute in order to promote consistency and to assist parties and their advisers to resolve disputes;
2. The objective of the courts is to achieve a fair outcome;
3. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles;
4. There should be no bias in favour of the money-earner and against the home-maker and child-carer;
5. Before reaching a firm conclusion, a judge would be well advised to check his conclusions against a yardstick of equality;
6. Such a check against a yardstick of equality is not to introduce a presumption of equality under a different guise;
7. The practice of restricting a wife to her 'reasonable requirements' cannot be justified; and
8. the fact that property has been inherited is relevant, but such property is not quarantined in the exercise of re-distributing the parties' assets.

There is no doubt that the decision in *White* has radically affected the disposal of property disputes in England, particularly those in the big-money category. However, the principles are

applied in England across the board, and the decision in *White* is not confined to cases of marriages of immense length where the parties have made massive and identical contributions.

In the case of *Elliot –v- Elliot*[15] there was a 12-year marriage with 2 children. The judge at first instance ordered that the former matrimonial home be sold and the proceeds applied to buy a new house for the wife and children. He ordered that the house be charged as to 45% of the value of the former matrimonial home in the husband's favour. Such charge would become exercisable upon the youngest child attaining majority, unless the wife died or remarried in the meantime. The Court of Appeal upheld the charge on the basis that it was justified on the basis of *White*. The device of the charge back emphasised equality of treatment. Given the wife's immediate and pressing need to be rehoused as she had the primary responsibility for the care of the children, and given that this was a case where there was not enough money to meet her housing needs and provide the husband with capital to reflect the contributions he had made, the only way to achieve any parity between the parties was on this deferred basis.

We have some concerns about the use of such charges. They do have a tendency to lock people into locations and they also offend the "clean break" principle. They are sometimes used as a substitute for taking difficult decisions. They were not unknown in proceedings under the old Commonwealth *Matrimonial Causes Act* but they have fallen into disuse in this country since the passage of the *Family Law Act* in 1975. We will return to the question of applying the big-money principles to small-money cases and the unforeseen problems that can ensue later in this paper.

15 [2001] FCR 53

The true ratio of *White*, as it has been applied and understood, is that fairness should be achieved in determining property disputes. As Lord Nicholls so aptly pointed out in *White* itself, "Fairness, like beauty, is in the eye of the beholder".

The English Court of Appeal has been anxious to avoid any misapprehension of the effect of *White*. The ratio of *White,* that the court's object is **fairness** (or a just and equitable outcome), not equality, must be emphasised.

As was indicated in the majority judgment in *Figgins*, the emphasis given to gender equality by their Lordships in *White* is a useful test to determine whether or not fairness has been achieved, but the two must not be confused, and the judge's discretion must not be fettered by a requirement for equality of outcome.

The cases that followed in the wake of *White* showed that it was being applied across the whole range of ancillary relief cases in England. They showed that the courts' previous determinative reliance upon the wife's needs had become relatively unimportant. Significantly, they emphasised the importance of weighing contributions in a non-discriminatory way. The cases show that the courts took on board the importance of considering a yardstick of equality of outcome and there was a general acceptance of the concept of fairness as articulated by the House of lords.

In May 2001 came the Court of Appeal's decision in a case called *Cowan –v- Cowan*,[16] which was the next decision to have a real impact following *White* and to examine in detail the approach of the courts to contributions.

Mrs Cowan appealed from a judgment at first instance given in the summer of 1999, before the case *White* reached the House of Lords. Mrs Cowan sought an increase from an award of

£3.2million (about AUD$10 million) to 50% of the family assets. The background to the case is complicated.

The parties married when they were aged 21 and 19 respectively. Neither brought any assets to the marriage and they lived in extremely modest accommodation and had low-paid jobs at that time. Two sons were born during the first 5 years of their married life. Their fortunes changed as the family business selling polythene to the building trade developed. In the mid-1960's, the husband formed a company for the manufacture of polythene bags and black plastic bin-liners. This was how the family fortune was made. At the time of the hearing, the family assets were valued at £11.5million (more than AUD$30million dollars).

Mrs Cowan claimed that her input into the family business in the early years was crucial, although it was clear that by the 1970's, she ceased to play any part in business affairs and devoted herself to her role as homemaker.

Mrs Cowan was awarded 38% of the family assets. The Lord Justices said that the husband had shown a "special achievement" through his "innovative visions" and "creativity". The husband's contributions were "stellar" and "special" and, accordingly, were valued more highly than the wife's.

Mrs Cowan was very unhappy about the Court of Appeal's handiwork and she hit the headlines at the time in England. She petitioned the House of Lords for leave to appeal. Perhaps because the case came so hard on the heels of *White* and because the House of Lords only so rarely makes a foray into the realm of matrimonial property, leave to appeal was refused. It is a shame because it seems to us that the decision in *Cowan* led to a certain muddying of the clear water left by *White* on the question of how the court values contributions.

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16 [2001] EWCA Civ 679

It was a case of "All contributions are equal, but some are more equal than others". The comments of Thorpe LJ in *Cowan* and the idea of "stellar" contributions appears to be a foray down the same road as "special contributions" in *JEL and DDF*. If the philosophy of *Figgins* is right – that it is unacceptable to discriminate against a wife because society puts a lower financial value on her domestic contributions, then that is also true even where the husband's financial contributions are valued extremely highly, such to have made him a multi-millionaire.

The impact of White in small-money cases in the England and Wales

We referred earlier to the English case of *Elliot*, where the Court of Appeal applied *White* principles in a small-money case. The question has been revisited more recently in the case of *Cordle –v-Cordle*.[17] In that case the Court of Appeal remphasised that *White* is not authority for the proposition that judges must produce equality of outcome unless there are good reasons to justify departure – there is no presumption of equality. The Court of Appeal said that, particularly in a small-money case, a judge would typically look at the housing needs of the parties and ensure always that any minor children of the family were the court's first consideration. In other words, *White* was not to be used to leave vulnerable parties out in the cold.

The majority of the Full Court in *Figgins* were concerned about the effect an equality approach would have for vulnerable parties in a low asset marriage. They considered that is a very real risk that to adopt a rigid equality approach would give an outcome that is far from just and equitable because it would not meet the needs of the homemaker and primary carer of the children where there is not enough wealth to go round. There is no greater inequality than to treat those who are unequal equally.

There has been some recent research conducted in the U.K. about the impact of *White* and on the question of whether the application of the principles across the board has led to lower awards in the small-money cases[18]. From a survey of English solicitors at the coal-face, the general consensus was that wives were in general receiving less generous settlements in the post-*White* era because of the way in which *White* was being applied across the board. We are confident that this was not the result that the House of Lords intended.

Conclusion

Approaching the question of contributions on a non-discriminatory basis does not mean equality of outcome will be the necessary result. To accord equal weight to the different types of contribution each party to the marriage makes does not, and should not, fetter the discretion of a judge to take into account the particular facts in a given case. That is the virtue of this jurisdiction – that in every case the judge can tailor-make a bespoke solution for the parties. However great care must be taken to ensure that the legislation is not interpreted in a gendered fashion that consciously or unconsciously gives weight to stereotyped views as to the role of the sexes. Relevantly to this matter, in the recent High Court of Australia decision in *De Sales v Ingrilli*,[19] Gaudron, Gummow and Hayne JJ drew attention to the fact that:

> *"Very great changes occurred during the last half of the twentieth century in the nature and durability of family relationships, in the labour market, and in the expectations that individual members of society have for themselves and about others - economically, socially, domestically, culturally, emotionally. Even if once it were the case, no longer can a court make any assumption about the role that an individual can be expected to play in the family or in the economy."*

As regards the future, as in the past, this area of law is a living creature and has to change over time as social mores and expectations and the nature of the roles played by the parties to a marriage change. No doubt too, we will see further proposals for amendment of family law

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17 [2001] EWCA Civ 1791

18 L. Fisher (2002) "The Unexpected Impact of White – Taking Equality Too Far?" *Fam Law* 108

legislation. In assessing such suggestions, we think it is essential to bear in mind the warning issued by Professor Reg Graycar:[20]

> *"One thing I do know, since the Women's Legal Service network has recently published its Fair Shares research, is that those in the other end of the market from the Ferraros, and the Whiteleys, find all of this a bit irrelevant. (…) for those women, the biggest problems are:*
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> - *violence and its effects on one's ability to agree with an ex-partner;*
> - *financial disclosure and how to avoid spending the rest of their lives being saddled with the debts of their ex-partner; and*
> - *the fact that their pool of property is too small for a lawyer to agree to do the work in exchange for a share…"*

We think also that the history of developments in this area indicates the care that must be taken when either the legislature or the Court embarks upon change. In Australia, at least until the decision of the Full Court in *JEL and DDF*, one might have thought that the law relating to matrimonial property was reasonably well settled. The differing philosophies expressed in that case and the cases of *Figgins* and *White* would now appear to call for determination by the High Court of Australia.

We have already commented upon the untoward effects flowing from the *White* principle of using equality of division as a test of fairness in relation to small money cases. This mirrors the expectations created by the former Australian government when it circulated a discussion draft of a proposed matrimonial property Bill in 1995. That Bill postulated a presumption of equality of contribution as a starting point. It was immediately hailed by men's groups amongst others, as providing a charter for equal division of property. That it did not, but we have little doubt that had it been enacted, a similar result to that flowing from *White* would have occurred in small money cases in this country.

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19 [2002] HCA 52 (14 November 2002) available at http://www.austlii.edu.au/au/cases/cth/high_ct/2002/52.html at par 65.

20 *If it ain't broke, don't fix it: Matrimonial property law reform and the forgotten majority* An address to a NSW Bar Association public forum, 20 May 1999 available at: http://www.familycourt.gov.au/papers/html/graycar.html

Postscript

The Court of Appeal has made available its judgment in the case of *Lambert –v- Lambert*[21]. The facts of the case can be briefly stated as follows.

It is a big-money case. The trial judge took the assets to be in excess of AUD$60million, all generated during the marriage. It was a 23-year marriage that produced two children. By the time of the hearing, the wife was aged 49 and the husband 57. The parties' significant wealth arose from the sale of the husband's business called Adscene in 1999, which he had started some 9 months before meeting the wife in 1973. Adscene produced and distributed a free local newspaper funded by advertising revenue. At first instance, the trial judge split the assets as to 63% to the husband and 37% to the wife. On appeal, the Court of Appeal increased the wife's award to 50% of the assets.

The Court of Appeal called this case a "textbook" ancillary relief problem. The lead judgment of Thorpe LJ considers in detail the vexed question of contributions and some of the issues we highlight in relation to the concept of "special" contributions in this paper.

The case of *Lambert* undoubtedly signals a generous pouring of cold water upon the concept of "special" contributions. Thorpe LJ falls just short of banishing the idea altogether, but he does limit the application of "special" contributions to exceptional circumstances. Thorpe LJ expresses his regret about the importance that has been attached to the idea of special contributions as enunciated in *Cowan*. His Lordship questions the reliance in that case which the Court of Appeal placed upon *Lynch* in light of the decision in *Figgins*.

In strictly limiting the application of the concept of "special" contributions, the Court of Appeal has taken the opportunity to warn against the invidious exercise of evaluating spouses' contributions in the courtroom and awarding marks to each.

The judgment in *Lambert* underlines the unfettered judicial discretion that forms the basis of the English law in this area. We are of the view that it also marks a re-emphasis of the principle in *White,* that to undervalue homemaking and parenting contributions in this context is sexist and cannot be justified. There is a clear recognition of the fact that the homemaker does not have the opportunity to create wealth, and that society as a whole tends to regard the financial value of homemaking contributions as lower than the financial value of the breadwinner's money-making.

We refer in our paper to the "muddying' of the clear waters left by *White* that *Cowan* represented. We are pleased that the decision in *Lambert* has gone some way to put an end to the confusion. We suggest that Australian practitioners may find some enlightenment from reading it, especially in relation to the decisions in *Lynch* and *Figgins* respectively.

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[21] [2002] EWCA Civ