Women lose out ... AGAIN

Ross Hyams

Property division — the consequences for women of the changes proposed under the Family Law Reform Bill 1994.

Although Australian society has changed much in recent years, the issue of 'property-less' women is still on the agenda. The problem is manifold, but has its starting point in the decisions made by married couples. Financial constraints have made it more and more unusual for the female partner to be able to 'stay at home' after marriage to concentrate on being a 'home maker' (even if she wanted to). After marriage it is usual for both partners to work. However, married partners who raise children find themselves facing a dilemma. At least for a short period during a child's infancy, one of the parents will be required to care for the child on a full-time basis. The unfortunate reality, due to the current economic structure of society, is that the male partner is likely to be the greater income earner. This has nothing to do with the fact of marriage. Women simply earn less than men — the reason for this is mainly the inertia of a long and unequal labour history. The female will usually agree to sacrifice her earnings (and sometimes future career prospects) for the common good. If the marriage ends in separation, this sacrifice will ultimately be to her detriment. Thus, the problem of women losing career opportunities and forfeiting future earning capacity is an on-going one because it has its basis in the financial structuring of marriages.

Why don't women attain property during marriage? They do, but it is shared property. The marriage attains property, not the individuals. The problem arises when 'the marriage' stops being an entity itself, and the partners revert to their previous individual status.

This article will look at the problems women have encountered as a result of the practices and outcomes arising from the current legislation. It will then examine the changes proposed by the *Family Law Reform Bill (No.2) 1994* to discover whether the Bill addresses these issues and, if not, how these problems could be resolved by amendments to the Bill.

Property, contributions and future needs

The factors set out under s.79(4) of the *Family Law Act 1975* are meant to provide a system by which we can balance the contributions made by the respective parties to a marriage, whether they be by way of money, assets, labour in the upkeep of the family home or contribution as parent or home maker. The main problem with this section as it currently stands is in the way it is interpreted.

Under the present *Family Law Act* we are told to look to past contributions, both financial and non-financial and then to future needs to determine who gets what share of the marital property. In such a division, at least three concepts must be interpreted. These are the words 'property', 'contribution', and 'future needs'. Women are being disadvantaged by the way all three of these concepts are currently being interpreted by family lawyers, judges and the general public in Australia.

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Property

The concept of property is defined in the Act and interpreted by lawyers and judges in a minimalist manner. Property is still being seen as tangibles only — as money, shares or 'bricks and mortar' assets.

One of the difficulties faced by women who are reliant on family law to determine their financial future after separation, is that the law puts them at a disadvantage simply because of their gender. It does not take sufficiently into account matters like lost career opportunities due to pregnancy and childbirth; the reduction of skills and the effect this has on future earning capacity; broken work patterns due to child-rearing and other family-related interruptions;[1] or other career sacrifices made by women to enable their husbands to increase their earning capacity. These choices are made for the financial health of the marriage in that the entity of 'the marriage' suffers a detriment from the wife agreeing to give up work to concentrate on child-rearing — a detriment which is off-set by the husband (the higher wage earner) continuing to be employed.

Ultimately, the husband will continue to enjoy the benefit of an unbroken work history after the marriage separation, partly due to the efforts of the wife. He will receive none of the detriment of the wife's broken employment career. Further, and worsening the position in which separated women find themselves, is the question of superannuation. Despite the fact that superannuation practices are changing (mainly due to legislation), women are generally still at a disadvantage in this area. The problem is compounded by the fact that contributions by the employer and the ultimate financial benefit when the policy vests are linked to wage levels. Because women's wage levels are generally lower than men's, women suffer disadvantage even when they have their own superannuation. Of course, it may be argued that an equitable property division under s.79 of the Act will take these matters into account on separation. The unfortunate reality is that it appears that it is rarely taken into account in a way that is fair to women.

It is grossly unfair to ignore the wife's personal financial losses when the marriage breaks down. This is, however, what continues to happen under the current law to a large degree. These matters are not too ethereal to be calculated by way of dollars. A study undertaken by Beggs and Chapman in 1988[2] states that a typical woman forgoes more than $300,000 in her lifetime from having her first child and another $50,000 from having her second. Property can and should mean more than simple assets purchased during the marriage. It has been proposed that the notion of property must be expanded if women are to be dealt with fairly under the Act — for example, to include a payment to the wife by way of 'compensation' for losses incurred because of child-rearing or lost career opportunities by taking on the role of home maker.[3]

Contributions

The main difficulty with the concept of contribution is that financial contribution is much easier for both lawyers and litigants to deal with, as we have no trouble conceptualising the house, the income or the assets which we can see and touch. Thus for lawyers working in the area, non-financial contributions tend to be put to the side as something to be taken into account, but less important than the actual *hard* assets. Also, because of the difficulties inherent in valuing non-financial contributions, they tend to play 'second fiddle' to the tangible contributions we can deal with, and in which we put more store.

A further obstacle in the question of contributions is in our patriarchal way of thinking. We have an expectation that men will and should be given a greater division of property, because direct financial contributions to the marriage are still seen by many (including lawyers who work in the jurisdiction) as being *more important* to the marriage than other less tangible contributions. We have become socialised to expect women to get less, even if we believe they deserve more and thus, the 'bricks and mortar' concept of what is property is not challenged by lawyers or litigants. Worse still, the female litigants themselves have a lower expectation of their own share in the property division, because they have a low opinion of what their contribution has been worth. The problem is self-perpetuating, because inferior outcomes for women in property divisions, which continue to disregard the less tangible contributions to marriage partnerships, just reinforce the stereotype that non-financial contributions are meaningless or have little value in the overall scheme of things.

Unfortunately, statistics support the anecdotal evidence relating to contributions by women. The Australian Law Reform Commission's 'Matrimonial Property Report'[4] indicates that contributions to household tasks have *no* statistically significant effect on the share of property received by women on separation. Further, contribution by way of workforce participation during the marriage also results in no statistically significant increase of the share of property for women. This is presumably because the small amounts that women are able to earn part-time whilst rearing a family are not considered enough to be taken into account as 'direct financial contribution' under the Act. Thus, women are disadvantaged if they work during the marriage, and disadvantaged if they don't! Small wonder that many women are disgruntled by the current legislation and view it as yet another outcome of patriarchal domination of the legal system.

Future needs

Post-separation factors are set out in s.75(2) of the Act. All these factors are forward looking in that they inspect the current circumstances of the parties to the marriage with a view to how these will affect the parties' financial position in the future. Statistical evidence from the Australian Law Reform Commission shows that the only post-separation factor that appears to have a bearing on future needs is the fact of supporting children.[5] Thus, the woman will receive a greater share of the matrimonial property if she is to be the custodial parent. In this area again, the anecdotal evidence is supported by the statistics. The personal experience of this author is that most family law practitioners will accept a small percentage increase (usually 5-10%) for the future needs of the custodial parent. However, this is often where the discussion stops and no other factors under s.75(2) are contemplated.

How does the Bill deal with property, contribution and future needs?

Amended property division legislation is currently proposed in Part VIII, Subdivision D (Sections 86-86K) of the *Family Law Reform Bill (No.2) 1994*. The sections which deal with the factors the Court must consider are ss.86C, 86D and 86E. The most controversial part of this proposed legislation appears to be s.86C(1) which states:

> In proceedings for a property order, a court is to assume that the parties to the marriage concerned have made equal contributions

> to the marriage as a whole, unless the court is satisfied, having regard to matters mentioned in subsection(2), that the contributions were not in fact equal.

Thus the Bill is proposing that the Family Court commence at a 50/50 presumption in the division of property. The rationale for this appears, at first glance, to be sound. It is based on the concept that both genders need to understand that marriage should be a 'partnership of equals'.

The major criticism which has been made about this section of the Bill is that the public perception will be that a 50/50 division is not the starting point but the end point. Assumptions will be made that the law has been changed so that, regardless of the individual circumstances, both parties will simply get half of the property each. Chief Justice Nicholson has attempted to deal with this criticism in the following statement:

> I hear what the law councils say about developing a public perception that that means an equal split, but one of the obligations of any government that introduces legislation is to ensure that the public is fully informed about what it means and what its effects are.[6]

With respect to His Honour, I believe this to be a very weak rebuttal of a compelling criticism. In practice, a large number of family law negotiations take place around the home coffee table, not in solicitors' offices. Ignorance and misinformation appears to reign supreme in this area of law, despite the best intentions of governments. For the correct perception of this alteration to filter its way into the public mind would take an enormous amount of government effort, akin to the type of exposure the Transport Accident Commission has had to make in its effort to reduce the Victorian road death toll. I find it difficult to believe that the Commonwealth Government would be prepared to spend the sort of money required to ensure the public has an accurate understanding of the minutiae of family law reforms such as this. The effect on the public perception of such a provision will be widespread and very distorting, affecting both formal and informal agreements.

The Select Committee, while having laudable objectives, has also failed to take into account the operation of s.86C(1) *taken together* with s.86C(3), as that section also assumes equality of contribution. Section 86C(2) then purports to look at financial and non-financial contributions. But how, if contributions are assumed to be equal? Thus, the interaction of s.86C(2) makes no sense at this stage, and it is difficult to see how it will be incorporated into the decision-making process. I fear that if the Bill becomes legislation as currently drafted, the operation of s.86C(2) will be so unsure that it will be ignored. If passed, the combined effect of ss.86C(1), 86C(2) and 86C(3) is potentially very dangerous for women.

To make matters worse, s.86B(2)(b) also poses a major hurdle for women. As currently drafted the Bill provides that future needs are *only* included if equality of starting point and contributions are not just and equitable. Thus, the onus of establishing future needs is on the party trying to show that a division should not be equal. The current legislation allows us to look to future needs in the factors set down in the present s.75(2). It does not direct us to that section *only if* the result based simply on contributions is not equal. Further, s.86D does not refer to the length of marriage and the effect of marriage on earning capacity, a factor to be considered under the current s.75(2)(k). The effect of these sections would be retrograde for women.

Mediation and 'private ordering'

The Bill puts a strong emphasis on non-litigious methods of property settlement. This initially appears sound as it is difficult to argue that litigation is a positive method of resolving property disputes with its concomitant financial and emotional expense and delays. However, further investigation reveals that the strong thrust the Bill gives in the direction of private ordering may, again, disadvantage women. To impel litigants towards settlement, the Bill makes extensive use of mediation and of private ordering by way of financial agreements.

Mediation

The current trend towards mediation in family law matters is supported by the Bill. Mediation, arbitration and counselling are raised to the level of 'primary dispute resolution methods' implying that if spouses have to resort to litigation this is a secondary process and so not as 'virtuous'. The Bill is silent as to when mediation may not be appropriate, ignoring the growing literature on the pitfalls of mediation for women. Currently no caveats exist in the Bill setting out when mediation should be avoided. Further, Division 2 of Part II of the Bill extends mediation to allow mediation organisations to become approved under the Act, thus expanding the pool of mediators to include community and private mediators. This is potentially a bonanza for mediation services and a major concern for women.

There is much evidence to support the assertion that mediation, despite enjoying current popularity as a private or non-litigious dispute settlement method, is inherently disadvantageous for women.[7]

Financial agreements

The Bill also pursues the course of extending private ordering. It provides for financial agreements which can be made any time during marriage. Such an agreement must be in writing, signed and witnessed. It can then be registered in the Court under s.76C(1) and its effect will be that of a property order (s.76D(2)(b)). The Bill provides for such agreements to be set aside or varied for various reasons under s.76F, but there is no approval provision which must be satisfied for the agreement to be registered except for the basic format provision of s.76(4). Thus, there is no equivalent of current s.87 agreements (which *do* require Court approval) in the Bill. The Australian Law Reform Commission in its submission to the Senate Legal and Constitutional Legislation Committee[8] points out that the Bill does not require either party to have independent legal advice, nor does the witness (required under s.76(4)(iii)) have to be a solicitor. This causes further concerns for the position of women, as the Commission states that the witness could be any person at all:

> For example, a member of the husband's family such as a brother or son can be a witness. This may disadvantage a woman. It ignores the dynamics of power within families regarding property.[9]

It seems that the current system of consent orders (Order 31, Rule 8 of the Family Law Rules) will be left intact by the Bill. These are the most popular form of consent orders and, even though they do not require Court approval, a Registrar will not make an order in the terms of consent orders if he or she does not think they are fair and equitable. This protection will still exist under the Bill. However, by obviating the s.87 procedure the Bill removes one more safeguard for women. Again, the Bill ignores arguments that the increasing tendency for private ordering may be detrimental for women.

The most serious problem with the concept of the private financial agreement is that it operates on incorrect assumptions: privately negotiated agreements assume that the parties involved are independent and autonomous, making intelligent, rational and unhurried decisions. Often, this is simply not so. At least litigation or court approval of agreements forces parties to stop and think about their rights and obligations. Many of the arguments against mediation are also applicable to private ordering. Added to this is the fact that there is extensive pressure in family law matters to settle because of the ever-present threat of litigation. Similar to the criticism of mediation, private ordering relegates property division back into the 'private realm' and does not subject the parties' decisions to public scrutiny. The system of financial agreements set out in ss.76-76J of the Bill ignores important research and analysis on the process of private ordering and does not provide for any protection for women.

Suggestions for amendment

Scrutiny of the Bill reveals that it requires substantial amendment to attempt to redress the gender imbalance in family law property matters. The Bill provides a unique opportunity to reconstruct family law in Australia to take into account the last 20 years of practice and the research and literature which has flowed from that experience. Specifically, as discussed above, I suggest the following areas of revision:

1. *Property* — A new definition is required in the Bill, to take into account non-tangible property. Currently, the Bill does not amend the present vague definition in s.4(1) of the Act. A much more detailed definition should be included in the Bill to take into account the modern understanding of property, which includes opportunity costs, loss of earnings, increased earning capacity and depreciated capacity for earnings.
2. *Contribution* — There should be no presumption of a 50/50 contribution to property. Contributions to financial resources should be included in the Bill, as currently such contributions are excluded by the operation of s.86B(2)(a). Contributions to the marriage by way of child-rearing and home making must be seen as being of primary importance. Sections 86B and 86C of the Bill require drastic amendment in order to provide compensation to the spouse making these contributions.
3. *Future needs* — Future needs should be taken into account in all property divisions. There should be no threshold necessitating a rebuttal of equality as presently set out in s.86B(2)(b). There must be recognition that women, simply by virtue of their gender, are at a disadvantage in their ability to earn income irrespective of marriage or separation. Further, s.86D must be amended to take into account depreciated earning capacity because of roles which were assigned during marriage, along the lines of the decision in the Canadian case of *Ormerod v Ormerod,* (1990) 27 RFL (3D) 225 (Ont. UFC)
4. *Spousal Maintenance* — In its current draft, those who do not satisfy the criteria of s.79A of the Bill relating to care of children, age, incapacity or other adequate reason are solely reliant on the factors set out in s.86D for future needs. As discussed, these factors are insufficient. Thus, at the very least, 'adequate reason' in s.79A should be expanded to include suffering loss of earning capacity and opportunity costs due to roles assigned during marriage, to enable more women to apply for spousal maintenance.
5. *Mediation* — Mediation should not be one of the techniques described as a primary dispute resolution method. Mediation of property disputes should be subject to careful scrutiny and public accountability. Section 19 of the Bill should contain some guidelines about when mediation may not be the most appropriate form of dispute resolution. Elaborate guidelines should be established according to Regulations made under the Bill which would provide minimum threshold levels for mediator and mediation service competence.
6. *Private Agreements* — Financial agreements under s.76 of the Bill should be subject to Court approval whether made in Chambers or open court. Similar to current s.86 agreements, the Court should retain a governing role and its jurisdiction should not be excluded. Further, a witness to the agreement should be a person from a category authorised by the Court, such as a solicitor or Justice of the Peace. These measures should provide some safeguards for women who are rushed, bullied or otherwise coerced into private agreements which are not in their best financial interests.

In its current form the Bill is regressive for women. It offers little in the way of protection from inequitable and unfair outcomes. It does nothing to reflect modern research and knowledge about power dynamics in relationships. If passed in its current form, the Bill will only serve to perpetuate the current patriarchal thinking which still, unfortunately, dominates the family law system of property division.

References

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3. Funder, K. and others, above, p. 202.
4. McDonald (ed.), *Settling Up: Property and Income Distribution on Divorce in Australia,* Prentice-Hall of Australia, Sydney, 1986, p.85.
5. McDonald (ed.), above, p.86.
6. Cited in the *Family Law Reform Bill 1994* and the *Family Law Reform Bill (No. 2) 1994,* Report by the Senate Legal and Constitutional Legislation Committee, March 1995, pp.62-63.
7. For a discussion of how women are disadvantaged by mediation see Bryan, 'Killing us Softly: Divorce, Mediation and the Politics of Power', (1992) 40 *Buffalo LR* 441.
8. Senate Legal and Constitutional Legislation Committee, Submission No. 17, Australian Law Reform Commission, 17 January 1995 at 15.
9. Senate Legal and Constitutional Legislation Committee, above.

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4. For some details, see the discussion of Rawls and the further readings in Kymlicka, W., *Contemporary Political Philosophy,* Clarendon Press, Oxford, 1990.
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6. On the dubious social functions which can be served by owning and appreciating art, see Bourdieu, P., *Distinction, a Social Critique of the Judgement of Taste,* translated by R. Nice, Routledge, London, 1984.
7. Checkland, S., *Guardian,* 11 and 12 January 1995, p.3. IFAR reports, 16, number 4, 1995, pp.4-5.
8. See, for example, Werness, Hope, in D. Dutton (ed.), *The Forger's Art,* University of California Press, Berkeley, 1983.
9. See Goodman, N., 'Art and Authenticity', and Lessing, A., 'What is Wrong with a Forgery?', in Dutton, above.
10. Gombrich, E., *Art and Illusion,* fifth edn, Phaidon, London, 1977; and Danto, A., *The Transfiguration of the Commonplace,* Harvard University Press, London, 1981. These arguments have not been uncontested. See Beardsley, M., 'Notes on Forgery', in Dutton, above.