ANGLO-AUSTRALIAN COLLOQUIUM

OXFORD CENTRE FOR FAMILY LAW AND POLICY

"THE END OF EQUALITY?"

Discussion on the centrality of contribution issues; the evolution of the law in relation to the assessment of special contributions in 'big money' cases

An Australian Perspective

"NEVER MIND THE LAW, FEEL THE POLITICS"

by The Hon. Justice Paul Guest
Family Court of Australia

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Special Contributions in Big Money Cases –

"Never Mind the Law, Feel the Politics"

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> "… The underlying idea is that a spouse exercising special skill and care has gone beyond what would ordinarily be expected and beyond what the other spouse could ordinarily have hoped to do for himself or herself, had the parties arranged their family lives and activities differently. The first spouse's special skill and effort is special to him or her, and the individuals right to the fruits of an inherent quality of this nature survives as a material consideration despite the partnership or pooling aspect of marriage. For my part, I think that this consideration is a material one to which weight can and should be given in appropriate cases."
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> *COWAN v COWAN* (2001) 2 FLR 192 per Mance, LJ at 242, (par 161).

INTRODUCTION

1. In this paper I propose to broadly consider the evolution of the law in Australia relating to the assessment of "special" or "exceptional" contributions in "big money" cases and its current status in family law. The limitation prescribed in the title to "big money" cases is, for my purpose, an expression of practical reality, conscious of the fact that the Full Court of the Family Court of Australia made it clear that the determination of such a contribution is not necessarily dependent upon the size of the asset pool[2].

2. The issue is an uncommon one and quite outside the usual daily fare of the Court in property disputes. However, such cases do arise from time to time and the issue of approach and distribution has excited considerable

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[1] I wish to acknowledge the generous contribution of Ms Che Stockley, Legal Researcher attached to the Family Court of Australia (Melbourne Registry) for her research of the Australian cases and their evolution in the assessment of special contributions in 'big money' cases.
[2] *JEL v DDF* (2001) FLC 93-075; cf *Stay v Stay* (1997) FLC 92-751

conflict and lively debate as to the manner in which the Court should deal with such wealth generated in the course of the marriage.

3. In the vast majority of marriages where parties commence their union with few assets and accumulate thereafter a home, superannuation entitlements and additional, but modest assets, any dispute over contribution does not generally present any difficulty. It is commonplace that such contributions, in the result, are treated as equal in a marriage of reasonable duration where one party works and the other raises the children and cares for the home consistent with the traditional division of labour addressed within their union. In such cases, the principal emphasis is generally placed upon any prospective adjustments pursuant to s 75(2) of the *Family Law Act* (1975) ("the Act")[3].

4. The concept, or doctrine of special contributions has generated understandable controversy. In those cases involving a husband who has generated wealth by force of his entrepreneurial skill and talent over a long marriage, has the wife's contribution as a homemaker and parent been systematically undervalued? Is a marriage a socio-economic partnership, the fruits of which are to be shared equally notwithstanding the differential contribution between partners? This question has now been brought into stark relief by the recent Full Court decision of *Figgins v Figgins*[4] importing into its text an extensive consideration of what the House of Lords had to

[3] *Zyk v Zyk* (1995) FLC 92-644 at 82,187; see also *Rolf v Rolf* (1979) FLC 90-629 at 78,272-3; *Ferraro v Ferraro* (1993) FLC 92-335; *McLay v McLay* (1996) FLC 92-667 at 82,902; *Doherty v Doherty* (1996) FLC 92-652 at 82,684; *Marando v Marando* (1997) FLC 92-754 at 84,169 and *Figgins v Figgins* (2002) FLC 93-122 at 89,301; also Fogarty J in *Waters v Jurek* (1995) FLC 92-635 at p 82,376 dealing with the significance of s 75(2), described by him as the "centre of gravity" in most property cases.

[4] See note 3.

say in *White v White*[5] and the subsequent Court of Appeal decision in *Cowan v Cowan*[6]. Then came *Lambert v Lambert*[7].

5. It is understandable that the requirement to assess contributions in cases of this nature may arguably be seen to sit incompatibly with a societal commitment to gender equality. But is that the test? Is it correct to say that the Family Court is not "recognising contribution in the 'special' skill cases, it is rewarding financial success", and that the Court was "doubly rewarding those at the top of the money pile because they happen to be there"[8]. The academic view expressed by Ms Young is consistent with a panorama of articles by various commentators who mostly, as I see it, express their opinions garnered from the various reported appeal judgments surveyed by them, but without any proper attention to the complex and detailed evidentiary base upon which the findings and conclusions were made by the trial Judge. That is not a criticism on my part, but a fact which is particularly significant given that a Judge at first instance heard, observed and considered a whole range of evidence over many days.

6. In Australia, the Full Court decisions in *JEL v DDF* and *Figgins* offer quite divergent directions to this complex and sensitive question. Sensibly, the starting point should be the statutory mandates pursuant to which the Court is empowered to alter the existing property rights of parties to a

[5] (2001) AC 596; (2000) 2 FLR 981
[6] (2001) 2 FLR 192
[7] (2003) 1 FLR 139
[8] L Young: "Sissinghurst, Sackville-West and Special Skill" (1997) 11 *Australian Journal of Family Law* 268 at 283

marriage. The Court is not concerned with division of property within the marriage[9]. Section 79 of the Act provides:

> "s 79(1) **[Orders]** In proceedings with respect to the property of the parties to a marriage or either of them, the court may make such order as it considers appropriate altering the interests of the parties in the property, including an order for a settlement of property in substitution for any interest in the property and including an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage, such settlement or transfer of property as the court determines.
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> 79(2) **[Just and equitable requirement]** The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
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> …
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> 79(4) **[Matters to be taken into account]** In considering what order (if any) should be made under this section in proceedings with respect to any property of the parties to a marriage or either of them, the court shall take into account –
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> (a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;
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> (c) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;
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> (c) 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;
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> (d) the effect of any proposed order upon the earning capacity of either party to the marriage;
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> (e) the matters referred to in sub-section 75(2) so far as they are relevant;
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> (f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and
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> (g) any child support under the *Child Support (Assessment) Act 1989)* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.

[9] see *Aroney v Aroney* (1979) FLC 90-709 at p 78,784

7. When considering the development of “special”, “extra”, “exceptional”, or “entrepreneurial” contributions (the nomenclature matters not) it is, in my view, appropriate to commence with *Mallet v Mallet*[10] which I will discuss in some detail later in this paper. This case remains a landmark decision and has not since been qualified by the High Court[11]. It is uncontroversial that the concept of special skills as an extra or special contribution has thus far been the subject of careful consideration and acceptance[12].

8. I do not seek to suggest that the legislation as interpreted and applied has not appropriately emphasised the “social and economic partnership of marriage”[13] and the principle that “parties to a marriage are equal in status”[14]. There is no argument or dissent on my part as to equality of status. The issue for my purpose is that of the special or extra contribution arising in cases of special skill or talent, not simply special effort alone. It is plain that a successful businessman’s rewards generally required much more effort from and imposed additional stress upon a wife regulating the parental, welfare and homemaker contribution. I do not cavil with the proposition that a wife’s contribution to the welfare of the family, including that in the capacity of a homemaker and parent[15], should be recognised in a “substantial way”,[16] for as Fogarty J explained in *Waters v Jurek,*[17] in:

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[10] (1984) 156 CLR 605, (1984) FLC 91-507
[11] This was despite commentary to the contrary expressed in 1984 Vol. 58 ALJ at p 436.
[12] see *Ferraro v Ferraro* (1993) FLC 92-335 esp at p 79,581 where the court said “in accordance with authority those special skills are entitled to recognition as an extra or ‘special’ contribution”; *Whiteley v Whiteley* (1992) FLC 92-304 per Rowlands J; *McLay v McLay* (1996) FLC 92-667; *Stay v Stay* (1997) FLC 92-751 and *Phillips v Phillips* (1998) FamCA 1551.
[13] *Ferraro* at p 79,561
[14] *Mallet* (supra) at CLR 608; FLC 79, 110
[15] s 79(4)(c) of the Act
[16] see *Mallet* per Gibbs CJ at FLC 79,111 and Mason J at FLC 79,119; for a discussion on the approach of Wilson J (at FLC 79,126) see *Ferraro* at 79,571-72 approving Nygh J at first instance in *Shewring v Shewring* (1987) 12 FamLR 139 at 141; (1988) FLC 91-926
[17] (1995) FLC 92-635 at 82,379

> "… most marriages, there is a division of roles, duties and responsibilities between the parties. As part of their union, the parties choose to live in a way which will advance their interests – as individuals and as a partnership …".

9. In the normal run of property cases before the court, it is correct to say that whatever the role division was between parties to a marriage, it involved a joint effort by them in which circumstance there is no reason to treat the efforts of one spouse as being intrinsically more worthy or valuable than the other following a breakdown of their union[18].

10. In *JEL v DDF,* where the net assets were about $36.7m and a significant issue involved argument centred on special contribution, the Full Court made it clear (inter alia) that there was no presumption of equality of contribution or partnership, and that in qualitatively evaluating the roles performed by the husband and the wife, there may arise special factors attaching to the performance of the particular role of one of them. Given the clear precedent to which I have referred, it is curious that this decision has excited considerable commentary, and at times, criticism[19].

11. And along came *Figgins,* where Nicholson CJ and Buckley J, when considering *JEL v DDF,* expressed concern whether, in the absence of specific legislative direction, courts should make subjective assessments of whether the quality of a party's contribution was "outstanding".

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[18] see P Parkinson: "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 *Federal Law Review* 1 at p 21. In that article, Parkinson deals also with special contributions as a "necessary exception to the common practise of the court in quantifying the homemaker contribution as being equal to the efforts of the other spouse".

[19] for example, in a paper "Developments in Case Law – The Entrepreneurial Factor – Full Court Reviews of Contribution" *Family Law Conference*, Bowral, 16 March 2001 the Hon. Eric Baker, a former and highly experienced judge of the Appeal Court drew no issue with the conclusions as to general principles summarised in par 152 of the judgment. However, in a paper "Never Mind the Quality – Feel the Width, Special Contributions" *10th National Family Law Conference,* (Melbourne) 2002, the Hon. J Fogarty, also a highly experienced former judge of the Appeal Court and colleague of Baker found it "*difficult to imagine a more negative assertion of principles"*. It is historically interesting to note that they co-authored the significant Full Court decision in *Ferraro*

Furthermore, their Honours took the view that the doctrine of special contributions should be reconsidered, particularly given the decision of the House of Lords in *White*[20]. As Ingleby subsequently wrote, "*Cry 'Figgins' and Let Loose the Dogs of War*"[21]. Perhaps that was a somewhat florid title, for calmer literary reflection was, in my view, provided by Dickey who sensibly described *Figgins* as an "intriguing case", in that the Full Court did not say what the law is, "but what the law probably is not", leaving it to another day to finally decide whether the family court should "continue to follow a well established principle concerning the assessment of contribution".[22]

12. It is plain that the fundamental factual matrix underpinning *JEL v DDF* (and its antecedents) and that of *Figgins* bear little comparison. The former dealt with special contributions founded upon a compelling evidentiary base. The latter, dealt with an inheritance (akin to a windfall) received by the husband as a result of the premature and accidental death of his father and his step-mother. In an interesting article *"Figgins – a New Direction or Just Rhetoric?",* the authors acknowledge, and with which I agree, that *Figgins* failed to provide any direction to the debate, its value being limited to generating further discussion and "the expression of an alternate view to that of a different Full Court in more recent cases".[23] Significantly

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[20] *Figgins* at p 89,295
[21] (2002) 8 *Current Family Law* 192. [It is open to speculate that the title chosen by Ingleby was a "slip".]
[22] A Dickey QC: " 'Special Contributions' to Property and the case of Figgins" (2003) 77 *Australian Law Journal* 575
[23] A Ross and S Moore, Vol. 16 No. 3 *Australian Family Lawyer* p 34 at 42

however, the doctrine of special contributions and special skills as such was not the subject of argument before it[24].

THE AUSTRALIAN CASES

13. It is convenient to commence with an evaluation of *Mallet* which represented a turning point as well as judicial acknowledgment of special contributions. The High Court decision "was significant in determining that there was no rule, principle or guideline that where assets were built up by the joint efforts of the parties to a marriage over a significant period, equality was a convenient starting point. As Mason J said in that case, it obscured the need to make an evaluation of the respective contributions of the husband and wife."[25]

14. The judgments in *Mallet* continue to serve as a useful starting point for a short survey, up to that time, of Australia's *Family Law Act*. In his judgment, Gibbs CJ described the moment at which the legislation, which gave the new Family Court extensive powers in relation to property, was enacted:

> "The *Family Law Act* was passed at a time when great changes had occurred, and were continuing to occur, in the attitudes of many members of society to marriage and divorce, but when it was (as it is now) difficult, if not impossible, to say that any one set of values or ideas is commonly accepted, or approved by a majority of the members of society."[26]

15. One version of the *Family Law Bill* 1974 "strongly reflected the view that financial arrangements between parties to a marriage should be finalised at the time of the divorce; from that time on, each should control his or her

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[24] At first instance, Carter J found that the husband's inheritance was a special contribution in the sense discussed in *McLay v McLay* (1996) FLC 92-667. The Full Court said that her Honour erred in finding that the husband's inheritance was a 'special factor' (par 55, 56 and 58). It was undoubtedly a very substantial financial contribution.

[25] Guest J, 'Special contributions: Inheritances, Windfalls and the like – are they special?', *1999 Family Law Residential,* Hyatt Regency, Coolum, Property Stream, at p 2

financial destiny."[27] Further, "the financial clauses, far more radical than the provision of a single ground for divorce based on twelve months' separation, were paid relatively little attention at this time; it was not until the legislation became operative that the heat surrounding the no-fault concept switched to financial considerations."[28]

16. The Act was assented to on 12 June 1975, and became operational in February 1976. Section 79 allowed for the alteration of property interests, and referred to a set of matters to be taken into account when considering what property order should be made. The criteria included reference to s 75(2), being additional matters to be considered in relation to future needs by way of any prospective adjustment.

17. Judicial approaches to the new statutory property regime at first indicated a desire to treat the contributions of parties equally, regardless of their role in the marriage. Gibbs CJ in *Mallet* described the development of the law, especially in relation to contributions under the new legislative scheme as follows:

> In some cases, the Family Court, rightly starting with the proposition that the contribution made by the wife as a homemaker and parent should be recognised "not in a token way but in a substantial way" (*Rolfe and Rolfe* (1979) FLC ¶90-629, at p. 78,273) has gone on to conclude that, at least in ordinary circumstances, such a contribution "ought to be equally equated to the efforts of the husband who is thus freed to pursue his direct outside employment". (*Wardman and Hudson* (1978) FLC ¶90-466, at p. 77,385; and see *Rolfe and Rolfe* (supra) at p. 78,273 and *Crawford and Crawford* (1979) FLC ¶90-647, at pp. 78,410-78,411). Even if it were assumed that the contribution made by one party to the home and family should be regarded as of equal value to the financial contribution made by the other, it would not necessarily follow that an equal division of property should be made by the order of the Court (see *Albany and Albany* (1980) FLC ¶90-905, at pp. 75,720-75,721). However, it has been said there is a "general rule ... that where the parties have been married for a substantial time, and there have been contributions by each of the parties, there should be an equal division":

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[26] *Mallet* (1984) FLC 91-507 at p 79,110
[27] L. Star, Counsel of Perfection, *Oxford University Press*, Melbourne, 1996, p 87
[28] Star p 87-88

> *Racine and Hemmett* (1982) FLC ¶91-277, at p. 77,574. In other judgments, the matter has been stated more circumspectly; it has been said that "after a long marriage, where both parties have worked together and built up such an asset as the matrimonial home by their joint efforts, even if the efforts of one were that of homemaker alone, equality should be considered the normal starting point": *Zdravkovic and Zdravkovic* (1982) FLC ¶91-220, at p. 77,207 and see *Potthoff and Potthoff* (1978) FLC ¶90-475, at p. 77,446; *Aroney and Aroney* (1979) FLC ¶90-709, at p. 78,789 ; *Dupont and Dupont (No. 3)* (1981) FLC ¶91-103, at p. 76,765 and *Pickard and Pickard* (1981) FLC ¶91-034, at p. 76,314.[29]

18. The difficulty with evaluation of contributions continues to be a source of comment today. For example, in a 2002 paper, Nabil Wahab explained:

> "Clearly, it is a very difficult task to evaluate contributions where one party is the homemaker and parent and the other party is the financial activist because the evaluation and comparisons are not conducted on a level playing field. You are comparing two different matters, one that can be quantified and the other that cannot."[30]

19. The issues under consideration for the High Court in *Mallet* arose from a marriage of 30 years. The wife applied for orders under s 79 and at first instance the trial Judge ordered that the wife receive half the value of jointly owned property, the value of her shares in the family company and 20% of the value of property owned solely by the husband. The value of those assets was rounded up to $260,000, and upon payment the wife was ordered to transfer her interest in the jointly owned property and the shares to the husband. Further orders were made for indemnities and costs.

20. The wife appealed and the Full Court of the Family Court held that equality is a convenient starting point in proceedings under s 79. The court said that this was not to be adopted as a principle which would fetter the discretion of the Court, but was to be viewed as a convenient starting point, and increased the wife's award to $335,000. By Special Leave to

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[29] *Mallet* per Gibbs CJ at FLC p 79111

appeal, the husband asked that the High Court overturn the Full Court's variation order. Separate judgments were delivered by each of the judges (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ) which in large part dealt with issues other than special contributions, including judicial discretion and equality as a starting point in s 79 decision making. Generally, the Court was of the opinion that the encouragement of "starting points" or "guidelines" was a restraint on the judicial discretion provided for in the Act.

21. Gibbs CJ, who allowed the appeal and restored the judgment of the trial Judge dealt with the equality and contribution issues, and was in large part focussed on matters surrounding the discretionary powers of judges allowed in the legislation. In addressing the trend to treat equality as a starting point, Gibbs CJ asserted that it was an unreasonable fetter on discretion and stated:

> "… the Parliament has not provided, expressly or by implication, that the contribution of one party as a homemaker or parent and the financial contribution made by the other party are deemed to be equal, or that there should, on divorce, either generally, or in certain circumstances, be an equal division of property, or that equality of division should be the normal or proper starting point for the exercise of the Court's discretion. Even to say that in some circumstances equality should be the normal starting point is to require the Courts to act on a presumption which is unauthorised by the legislation. **The respective values of the contributions made by the parties must depend entirely on the facts of the case,** and the nature of the final order made by the Court must result from a proper exercise of the wide discretionary power whose nature I have discussed, unfettered by the application of supposed rules for which the *Family Law Act* provides no warrant."[31] (my emphasis)

22. In restoring the discretion exercised by the trial Judge, Gibbs CJ said:

> "In the present case it was clear that *Bell* J. did not overlook any of the factors to which the Full Court referred. He said nothing to indicate that he did not give them adequate weight. The conclusion reached by the Full Court that he had failed to give them proper weight can only be

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[30] N. Wahab, 'One rule for the rich, one for the poor', *Lawyers Weekly,* 8 Feb 2002, pp 12-13 at p 12; see also P. Parkinson: "Quantifying the Homemaker Contribution in Family Property Law", Fn 18 at p 59

[31] *Mallet* per Gibbs CJ at FLC p 79,111

> explained by the fact that their Honours disagreed with his conclusion. However, the mere fact that they themselves would have made a more liberal provision for the wife was no justification for substituting their own exercise of discretion for that of the primary Judge."[32]

23. Wilson J joined with the Chief Justice in restoring the order of the trial Judge. On the issue of contribution, Wilson J echoed earlier words of Evatt CJ of the Family Court that the legislation:

> "… requires that the contribution of a wife as a homemaker and parent be seen as an indirect contribution to the acquisition, conservation or improvement of the property of the parties regardless of where the legal ownership resides. The contribution must be assessed, not in any merely token way, but in terms of its true worth to the building up of the assets. **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.** The quality of the contribution made by a wife as home maker or parent may vary enormously, from the inadequate to the adequate to the exceptionally good. She may be an admirable housewife in every way or she may fulfil little more than the minimum requirements. Similarly, the contribution of the breadwinner may vary enormously and deserves to be evaluated in comparison with that of the other party. It follows that it cannot be said of every case where the parties reside together that equal value must be attributed to the contribution of each. That will be appropriate only to the extent that the respective contributions of the parties are each made to an equivalent degree. What the Act requires is that in considering an order that is just and equitable the Court shall 'take into account' any contribution made by a party in the capacity of homemaker or parent. It is a wide discretion which requires the Court to assess the value of that contribution in terms of what is just and equitable in all the circumstances of a particular case. There can be no fixed rule of general application."[33] (my emphasis)

24. The judgment of Dawson J allowed the appeal and restored the order made by the trial Judge. In his judgment, his Honour noted the trend towards using the starting point of equality, and, significantly, had this to day:

> "No doubt such an approach is appropriate in those cases where the financial contribution of the husband does not extend beyond the provision of the family home and the acquisition of savings to provide support for both parties to the marriage in retirement. It may well be appropriate in other cases where the husband's contribution extends beyond the matrimonial home and any savings from earnings to the acquisition of property for commercial purposes … But it does not follow in every case where the husband earns the family income and the wife carries out her responsibilities in the home that the contribution of each to property acquired during cohabitation should be regarded as equal. **If,**

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[32] *Mallet* per Gibbs CJ at FLC p 79,114

[33] *Mallet* per Wilson J at FLC p 79,126 (See however comments by the Full Court in *Ferraro* at p 79,571 quoting with approval Nygh, J in *Shewring v Shewring* (1987) 12 Fam LR 139 at 141)

> **for example, the husband is engaged in conducting a business, the nature of the business, the skills which the husband applies in it, the way in which he applies those skills and the manner in which the business has been built up,** are all factors which may indicate that it is inappropriate to assume equality of contribution towards the acquisition, conservation or improvement of property during the subsistence of the marriage."[34] (my emphasis)

25. Mason J delivered the first of the dissenting judgments. He allowed the appeal but only to the extent of reducing the amount to the wife from $335,000 to $310,000. He wrote that the:

> "… Family Court has stated – and in my view correctly stated – that the purpose of sec. 79(4)(b) is to give recognition to the position of the housewife who, by her attention to the home and the children frees her husband to earn income and acquire assets … And it has been held, again correctly in my view, that the Act intends that the wife's contribution as a homemaker should be recognized in a substantial and not merely in a token way. However, the judges of the Family Court have gone a step further by saying that the contribution of the wife as homemaker is to be equated to the contribution of the husband as income earner …
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> This approach has led to the enunciation of the proposition that after a long marriage where both parties have worked together and built up such an asset as the matrimonial home by their joint efforts, even if the efforts of one were that of homemaker alone, equality should be considered the normal starting point, **though the particular facts of a case may justify a finding of greater contribution by one than the other…**
>
> It seems that the proposition has been accorded the status of a legal presumption though some attempt has been made to confine its area of operation. …"[35] (my emphasis)

26. Mason J continued that "[t]his exposition of the proposition that equality is a convenient starting point proceeds upon a misconception of sec. 79. The section contemplates that an order will not be made unless the Court is satisfied that is it just and equitable"[36] to do so. He went on:

> "Thus, **the Court must in a given case evaluate the respective contributions of husband and wife under para. (a) and (b) of subsec. (4), difficult though that may be in some cases.** In undertaking this task it is open to the Court to conclude on the materials before it that the indirect contribution of one party as homemaker or parent is equal to the financial contributions made to the acquisition of the matrimonial home on the footing that that party's efforts as homemaker and parent have enabled the other to earn an income by means of which the home was acquired and financed during the marriage. To sustain this conclusion the materials before the Court need to show an equality of contribution – that the efforts of the wife in her role were equal of the husband in his.

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[34] *Mallet* per Dawson J at FLC p 79,132
[35] *Mallet* per Mason J at FLC p 79,119
[36] *Mallet* per Mason J at FLC p 79,120

> No doubt a conclusion in favour of equality of contribution will be more readily reached where the property in issue is the matrimonial home or superannuation benefits or pension entitlements and the marriage is of long standing. **It will otherwise when the property in issue consists of assets acquired by one party whose ability and energy has enabled the establishment or conduct of an extensive business enterprise to which the other party has made no financial contribution and where the other party's role does not extend beyond that of homemaker and parent.**
>
> The proposition developed by the Family Court and applied by the Full Court in the present case has two flaws. The first is that it has been elevated to the status of a legal presumption; the second is that it obscures the need to make an evaluation of the respective contributions of husband and wife by arbitrarily equating the direct financial contribution of one to the indirect contribution of the other as homemaker and parent."[37] (my emphasis)

27. However, Mason J concluded that "the Full Court was entitled to conclude that the primary Judge did not make adequate allowance for the wife's contribution to those assets of the husband of which he was the sole owner."[38]

28. Deane J, dissenting, dismissed the appeal with costs, but reduced the amount payable to the wife. In agreeing with the conclusion expressed in the judgment of Mason J, his Honour said of the discretion conferred by s 79 of the Act that the:

> "… exercise of that discretion is neither fettered by any general rule or a presumption of law that an appropriate order under sec. 79 will effect an equal division between husband and wife of assets acquired during the life of the marriage. In each case, the Family Court must pay regard to the matters specified in sec. 79(4) and determine whether it is just and equitable that any order be made and, if it is, what represents the appropriate order in the particular circumstances of the case before it. On the other hand, the circumstances of a particular case may well be such as to lead the Family Court to conclude, as a matter of fact, that equality is an appropriate starting point in determining the particular order to be made under sec.79."[39]

29. Whilst affirming the broad discretion conferred by the section, Deane J noted that equality may be an appropriate starting point in an appropriate case. He added that it is "inevitable and desirable" for Family Court

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[37] *Mallet* per Mason J at FLC p 79,120
[38] *Mallet* per Mason J at FLC p 79,122
[39] *Mallet* per Deane J at FLC p 79,128

Judges to look to past decisions for guidance in a particular type of case. His Honour went on to assert that the statements of the Full Court in this case reflected common sense based on experience, not an assertion of a presumption or proposition of law.[40] In addition the High Court gave considerable support and recognition to the fact of disparate contributions within the marriage.

30. More recently, commentators have noted the importance of *Mallet* in that it stands as the starting point of the notion of special contribution.[41] Further, *Mallet* unequivocally rejected the idea that there is a starting point of equality "whatever commentators or particularly constituted Full Courts or trial judges might prefer to be the case."[42] In addition, the High Court gave considerable support and direction to the fact of disparate contributions within marriage.

31. The Honourable Eric Baker identified the difficulty created by the High Court's affirmation that the contribution of the homemaker should be recognised and that this role often frees the other party to pursue financial gain, especially in relation to "assessing contributions and how far, if at all, Courts should look at the respective quality of those contributions."[43]

32. Parkinson argues:

> "The doctrine of special contribution, as it has come to be known, is controversial. It finds no expression in the language of s 79 itself. However, it is best understood as the residual echo of *Mallet* within the jurisprudence of Australian family property law. The Family Court could not, consistently with *Mallet*, say that in *all* cases the contributions of the parties during the marriage should be considered as equal. The doctrine

[40] *Mallet* per Deane J at FLC p 79,129
[41] A. Dickey, QC ''Special Contribution' to Property and the Case of Figgins', at p 575
[42] R. Ingleby, 'Cry 'Figgins' and let loose the dogs of war', 8 *Current Family Law*, (2002) pp 92-195 at p 193
[43] Baker, The Hon E., 'Developments in case law – The entrepreneurial factor – Full Court Reviews of Contributions' *Family Law Conference*, Bowral, 16 March 2001, at pp 3-4

> of special contribution is therefore a necessary exception to the usual practice of the Court in quantifying the homemaker contribution as being equal to the efforts of the other spouse in earning income during the course of the marriage."[44]

33. The next significant case is that of *Norbis v Norbis*[45] where the High Court revisited some of the concepts it had examined in *Mallet*, but the decision did not take special contributions any further. It is significant in that where a differently constituted High Court majority in *Mallet* had decided that the use of "starting points" and "guidelines" placed restraint on judicial discretion, the majority in *Norbis* determined that guidelines were an appropriate, necessary and useful tool for first instance decision making. The judgment also stands as the leading case whether, in property division, a trial judge should either look at each asset, "asset by asset" or adopt a "global" approach to the assets when altering the property interests of the parties.

34. In *Norbis*, the parties were married for 30 years. After buying, developing and selling real property for some time, at separation, the parties either jointly or separately owned six properties. At first instance the trial judge split the interest in five of the properties 60/40 in favour of the husband, and the sixth property was also split 60/40, favouring the wife. On appeal the Full Court expressed the view that it was not appropriate to separate off individual assets and in a marriage of long duration a global view of the assets of the parties should be taken.

35. In a comment on contributions, Mason and Deane JJ expressed the following:

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[44] P. Parkinson 'Quantifying the Homemaker Contribution in Family Property Law' supra at p 26
[45] (1986) 161 CLR 513; (1986) FLC 91-712

> "The Family Court has rightly criticised the practice of giving over-zealous attention to the ascertainment of the parties' contributions, and we take this opportunity of expressing our unqualified agreement with that criticism, noting at the same time that the ascertainment of the parties' financial contributions necessarily entails reference to particular assets in the manner already indicated."[46]

36. Wilson and Dawson JJ expressed a view in which they would have restored most of the orders of the Trial Judge. Brennan J allowed the appeal and agreed with the reasons of Mason and Deane J.

37. The first classic reference to special contributions arose in *Whiteley v Whiteley*[47] involving one of Australia's greatest contemporary painters. The judgment is often cited in subsequent decisions on special contribution and provides a useful example of a case where the husband's income was earned through an individually distinct and unique talent. For that reason, it is seen to exemplify what is meant by "special" in special contribution and skill.

38. The parties were married for 25 years. The wife claimed to have been the husband's artistic inspiration, model and companion as well as carrying out the homemaker/parent role. The dispute dealt with property in the order of $11m, accumulated through the husband's rare artistic talent. This was a first instance decision in which Rowlands, J divided the property 67.5/32.5 in favour of the husband and collaterally gave recognition to the contribution of the wife which had been one of "critic and artistic confidante". His Honour also accepted expert evidence that the wife had "a very sound knowledge of art and a very astute eye", which he found to

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[46] *Norbis* FLC at p 75,168
[47] (1992) FLC 92-304

be "of value to the husband and assisted him in his artistic journey."[48] In relation to the contributions of the husband, Rowlands J found:

> "… because of his special skill as an artist, he made by far and away the major contribution to the substantial assets the parties now have. His is an unusual talent which has been instrumental in reaping a rich reward. However, given this situation, the wife's contribution has been unusually helpful to him in the process.
>
> While giving due weight to the wife's contribution in the various areas to which I have referred it is clear that it has been the husband's industry and talent which has been substantially more significant of the two."[49]

39. The decision in *Whiteley* is notable because it exemplifies the difficulties in decision making in this area, namely, where it is the breadwinner's special talent that achieves financial success rather than ordinary hard work. Parkinson commented:

> "If the Court is going to assess contributions as the Act, interpreted by *Mallet* requires then it has to make room for special talent, for it cannot sensibly maintain the proposition that luck and effort explain financial success or failure in all cases. The cases to which this kind of reasoning is most applicable are cases of special talent, not special effort."[50]

40. The decision in *Ferraro* represents the Full Court's first classic recognition of special contributions being made by a party to the marriage arising from commercial success[51]. The husband and the wife married in 1963 and separated in 1990. At first instance, the trial Judge divided the property 70/30 in favour of the husband. The wife appealed, arguing that her contributions were equal to the husband's and that the trial Judge erred in according the wife's homemaker contributions less status that the husband's contribution.

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[48] *Whiteley* at p 79,299
[49] *Whiteley* at p 79,299
[50] P. Parkinson, 'Quantifying the Homemaker Contribution in Family Property Law', p 26
[51] Prior to *Ferraro* the court distinguished between business assets and other assets, particularly where substantial business fortunes were generated. The doctrine of special skill emerged as a properly explained principle to justify an outcome of unequal contribution in a high value business asset case on the basis of special skill.

41. The Full Court, comprised of Fogarty, Murray and Baker JJ, allowed the appeal and increased the award to the wife from 30% to 37.5%. In their joint judgment, they noted the English approach at that time of dividing property on the basis of need rather than contribution. They said:

> "[n]o doubt the differences in the legislation provide the main explanation for the differences in approach. In Australia, the legislation as interpreted and applied since Albany and Pastrikos, emphasises the social and economic partnership of marriage and the principle that 'the parties to a marriage are equal in status': per Gibbs, in *Mallet* at CLR 608, FLC 79,110. Consequently, on the breakdown of that marriage the economic fruits of the marriage, namely the property which the parties then have, should be divided between them having regard to those principles, and not upon an approach by which the interest of one party (almost invariably the wife custodian) in that property is 'bought out' by an assessment of that party's future needs and leaves the balance with the other party."[52]

42. In stating that, the Full Court asserted that a homemaker should not have their award limited to an amount, when capitalised, that would last his/her lifetime, while the income earner kept the rest. This approach was reassessed by the English courts in *White* to which I will shortly refer. The approach endorsed by the Full Court in *Ferraro* was that the contribution of each of the parties should be considered ahead of what each would need to sustain themselves over the coming years.

43. The *Ferraro* Full Court noted that the value to be placed on the wife's contribution "was a significant matter in this case", and said:

> "The issue here is not whether the wife made direct contributions to the conduct of the business. His Honour found that she had not. The facts are that the husband, particularly in the latter years, devoted his full time attention to his business activities and thus the wife was left with virtually the sole responsibility for the children and the home. That latter circumstance is significant not only in relation to the evaluation of the wife's homemaker contributions under para (c) but is important under para (b) because it freed the husband from those responsibilities in order to pursue without interruption his business activities. In addition, the wife by her joint ownership made the contributions referred to previously."[53]

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[52] *Ferraro* p 79,561
[53] *Ferraro* pp 79,568-9

44. The Full Court also recognised the difficulty in assessing contributions, particularly in relation to "evaluating and comparing" them "where one party has exclusively been the breadwinner and the other exclusively the homemaker". This is because, they argued:

> "… 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 constitutes a competent homemaker and parent and cannot be readily equated to the value of assets required. This leads to a tendency to undervalue the homemaker role.
>
> However, **there are cases where the performance of those roles has what may be described as "special" features about it** either adding to or detracting from what may be described as the norm. For example, in relation to the homemaker role the evidence may demonstrate the carrying out of responsibilities well beyond the norm as, for example, where the homemaker has the responsibility for the home and children entirely or almost entirely without assistance from the other party for long periods or cases such as the care of a handicapped or special needs child. On the other hand, in the breadwinner role the facts may demonstrate **an outstanding application of time and energy to producing income and the application of what some of the cases have referred to as "special skills".** Within either role there may be cases where the evidence demonstrates a neglect of those responsibilities or a wasting of income or assets."[54] (my emphasis)

45. The Full Court said that changes in general public attitudes, legislative change and recent Full Court decision making cumulatively demonstrated "greater recognition to the contribution of a homemaker and parent when compared with the more obvious and direct financial contributions of the breadwinner."[55] With that there can be no dispute.

46. The Full Court also expressed concern that the doctrine of special contribution had been confined to cases involving the creation of considerable wealth. They said:

> "In all of the reported cases we have referred to it was said that the 'business acumen' or 'entrepreneurial skill' of the husband was a 'special

[54] *Ferraro* at p 79,572
[55] *Ferraro* at pp 79,573-4

> 'skill' or an 'extra contribution'. They were all cases where the assets were of a very significant value. There does not appear to be any reason in principle or logic why those business skills should be treated differently from the high level of skill by a professional or trades person such as a surgeon, lawyer or electrician. Typically, in those cases there is a high level of professional skills and the resultant imposition on the other partner of a substantial extra burden in relation to the home is common. The fundamental difference is that those cases normally do not produce the very high value of property with which this and comparable cases are concerned, and a common outcome, other aspects being equal, is one approximating equality (although as previously pointed out, s 75(2) may intrude in such cases).
>
> Whilst the application of skill may be the same, the difference seems to be that in the one case the application of that skill produces assets which fall within what may be described as the medium range whilst in the cases such as that before us, it produces assets in the high range."[56]

47. Dickey argued that if *Mallet* sowed the seeds of special contributions, then *Ferraro* marked the "flowering" of the concept.[57] For an analysis of this significant decision, see "*Saga of Ferraro"*.[58] In that paper, support was drawn from Chisholm, J who said (inter alia) that the assessment of contribution commences with the view that marriage is an economic unit between equals, and that "where the bread winners special skills produce exceptionally high returns, this should be reflected in the assessment of the parties contributions, even where the domestic contribution is also strong."[59] His Honour remarked that such an approach was required by the existing law.

48. In *McLay*[60] the parties lived together for 21 years and had one child. The trial Judge found that the contributions of the husband outweighed the contributions of the wife, but that upon careful analysis certain of the husband's investments were not the product of special skill or a special contribution, leading to a 50/50 division. Most of the assets were divided

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[56] *Ferraro* at pp 79,579-80
[57] A. Dickey, QC, '"Special Contribution' to property and the case of Figgins", *Australian Law Journal*, Vol 77, 2003, pp 575-8 at p 575
[58] Guest, QC; *Family Law Practitioners Association of W.A.,* Rottnest Island, October 1993
[59] Vol 1 *Australian Family Law* (Butterworths – 1993) at p 1472
[60] (1996) FLC 92-667

this way, save for one class which was divided 90/10 in the husband's favour by reason of the special skills he had exercised in obtaining those particular assets.

49. A Full Bench comprised of Nicholson CJ, Fogarty and Dessau JJ heard the appeal and upheld the trial Judge's approach, dismissing the husband's appeal. The Full Court was also invited to reconsider the decision in *Ferraro*, but said instead "we consider that the discussion by the Full Court in that case of the difficult area of evaluating disparate contributions is of considerable value and no reconsideration is called for."[61]

50. In *Stay*[62] the parties were married for 27 years and at the time of trial their five children were all adults. For most of the marriage the wife was a full time homemaker. The husband was engaged in employment, ultimately establishing a business enterprise of his own. The great bulk of the party's assets were accumulated from 1985 onwards. The trial Judge characterised the husband's contribution as "special".

51. On appeal to a Full Court comprised of Nicholson CJ, Ellis and Lindenmayer JJ, the bench delivered a single judgment in *Stay* in which they supported the doctrine of special contributions, but confined the doctrine to cases involving assets in the high range rather than average assets. This was in support of what the Court had said in 1993 in *Ferraro*, on the issue of special skill, and the trend to recognise it only in cases

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[61] *McLay* at p 82,901; see also discussion on *McLay* by Guest J in *"Special Contributions"* (supra) at p 9-11. (see footnote 25)
[62] (1997) FLC 92-751

where assets were valued in the tens of millions. Having considered *Ferraro*, *Whiteley* and *McLay*, the Full Court found:

> "In the instant case, the application of the skills of the husband, his ingenuity and enterprise produced assets in the medium rather than the high range as in the three authorities we have referred and, in our view, the trial Judge erred in concluding that his contribution had the quality described in the authorities as special or extra or as she found as being extraordinary. Thus, although conscious of the finding of the trial Judge, that "[A]n analysis of the parties' net worth and the facts between 1985 and separation reveal that the assets have been acquired largely through the husband's efforts", we are of the view that, in assessing the totality of the contributions of the parties, her Honour attached too much weight to the financial contributions of the husband and his efforts in the acquisition of the property."[63]

52. In *Phillips v Phillips,*[64] the parties were married for 31 years and at the time of the hearing there were two adult children born of their union. Both parties worked during the marriage and the wife's steady wage allowed the husband to make the move to self employment. The trial Judge recognised the husband's special contribution and the Full Court affirmed:

> "It was open to her Honour, on the evidence, to find that the husband's contributions were greater than those of the wife after the establishment of the Villa World Project. The project was established approximately 10 years prior to separation of the parties. … However, it is also said that the wife's role was more passive than active. Her Honour did not overweigh financial contributions against non-financial contributions. Further, we are not persuaded that her Honour credited the husband with the efforts made by others. Her Honour identified the greater contribution by the husband and did not, in evaluating this contribution, and determining the weight to be attached to it, "over value" the husband's contribution. In our opinion, what her Honour did was identify the respective contributions of the parties and evaluate these contributions. Her Honour came to the conclusion that the husband's contributions were greater than those of the wife."[65]

53. The Full Court also discussed the legislative reform which had occurred after the decision in *Mallet*. The changes, they found, did not expand on the legislation nor did they overrule *Mallet*.

> "76. The Family Law Amendment Act 1983 inserted s.79(4)(c). Prior to 1983 there had been provision in s.79 recognising the contribution of a party as homemaker and parent. However, the drafting left it open to argument that such contributions had to be related to the property of the parties. The amendment resolved

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[63] *Stay v Stay* (1997) FLC 92-751 at pp 84,131-2
[64] [1998] FamCA 1551; Ellis, Kay and O'Ryan JJ
[65] *Phillips* at par 73

> the doubt by making it clear that the contribution is to the welfare of the family and is not confined to a contribution to the acquisition, conservation or improvement of property.
>
> 77. We do not accept that the effect of the 1983 amendments was to place greater emphasis on non financial contributions. The suggested interpretation had been largely ignored prior to the 1983 amendments. In *Mallet v Mallet* at 79,119 Mason J, although dealing with s.79 prior to the 1983 amendments, said that a contribution as homemaker should be recognised in a substantial and not merely in a token way."[66]

The Court found that the contributions of the wife had been appropriately identified and evaluated.

54. Save in one instance, the decision of *JEL v DDF* added no new dimension to the cases I have thusfar examined, but conveniently sewed together a number of helpful principles. The parties were together for 18 years and had three children. The husband was an employed geologist and through a series of business transactions amassed considerable wealth, valued by the trial Judge at net $36.7m. During the marriage, the wife made contributions as a homemaker, but during the relationship became unwell and her contributions diminished as a result. The trial Judge divided the property 65/35 in the husband's favour.

55. While Kay J agreed with the reasoning process of the judgment of Holden and Guest JJ, he added comments that cases dealing with large amounts of money are rare in the Family Court and noted:

> "[a] division based on contribution findings frequently leaves each party with adequate means to meet any expense that they might reasonably expect to have for the rest of their lives. The s 79(4)(e) considerations become less significant. Some guidance as to the limits of a proper exercise of discretion in such very large money cases can be drawn by reference to earlier decisions."[67]

Kay J recognised the greater role played by the husband in this case than in others (*Phillips* and *Ferraro*) and while noting that this was a

[66] *Phillips* at pars 76-77

discretionary judgment, could not accord the division at first instance with other recent, comparable decisions. He agreed with Holden and Guest JJ that the Full Court should substitute its own assessment.

56. In their orders, Holden and Guest JJ substituted the 65/35 division for 72.5/27.5 in favour of the husband. They characterised a judge's task under s 79(2) and 79(4) as being "to evaluate the 'quality' of the parties' respective contributions and then to compare them."[68] Their Honours assessed differing authority provided by the Full Court in *McLay* and *Ferraro*:

> "The issue of 'special' or 'extra' contribution by the husband or wife is a question of fact. In our view, the determination of such a contribution is not necessarily dependant upon the size of the asset pool or the 'financial product' achieved by the parties. … The concept of a 'special' or 'extraordinary' skill or factor cannot, without more, be rendered nugatory by the fact that the assets accumulated by the parties did not reach the magnitude of many millions. To suggest otherwise would seem, in our view, to defy the proper jurisprudential development in this area of Family Law and fail to meet the relevant provisions of the Act."[69]

57. Holden and Guest JJ also affirmed that although a trial judge could be guided by past judgments, this should not fetter the discretion allowed for in the legislation. Their Honours then summarised a series of general principles in relation to special contributions which arose from the earlier cases.

> "(a) There is no presumption of equality of contribution or "partnership".
>
> (b) There is a requirement to undertake an evaluation of the respective contributions of the husband and the wife.
>
> (c) Although in many cases the direct financial contribution of one party will equal the indirect contribution of the other as homemaker and parent, that is not necessarily so in every case.
>
> (d) In qualitatively evaluating the roles performed by marriage partners, there may arise special factors attaching to the performance of the particular role of one of them.

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[67] *JEL v DDF* (aka *Lynch v Fitzpatrick*) (2001) FLC 93-075 per Kay J at par 3
[68] *JEL v DDF* per Holden and Guest JJ at par 128
[69] *JEL v DDF* per Holden and Guest JJ at pars 133 and 134

> (e) The Court will recognise any such special factors as taking the contribution outside the "normal range" in the sense that that phrase was understood by the Full Court in *McLay* [(1996) FLC 92-667].
>
> (f) The determination of an issue of whether or not a "special" contribution or "extra" contribution is made by a party to a marriage is not necessarily dependent upon the size of the asset pool or the "financial product". When considering such an issue, care must be taken to recognise and distinguish a "windfall" gain.
>
> (g) Whilst decisions in previous cases where special factors were found to exist may provide some guidance to judges at first instance, they are not prescriptive, except to the extent that they purport to lay down general principles.
>
> (h) It is ultimately the exercise of the trial Judge's own discretion on the particular facts of the case that will regulate the outcome.
>
> (i) In the exercise of that discretion, the trial Judge must be satisfied that the actual orders are just and equitable, and not just the underlying percentage division."[70]

58. In *JEL v DDF*, the wife made Application for Special Leave to appeal to the High Court. One ground of the Application complained that the Full Court misconstrued s 79(4)(a)(b) and (c) of the Act by holding that a discrete class of "special", "extra" or "extraordinary" contributions exist by reason of "special" or "entrepreneurial" skills or factors above the otherwise normal range of contributions in circumstances where the provisions of the Act only refer to and require the "contributions" of the parties to a marriage to be taken into account. It was submitted that it was of public importance and in the interests of the administration of justice that this "error" of the Court in the construction of those sections be corrected. The application was dismissed by McHugh and Kirby JJ on 27 June 2001, concluding that the Full Court had addressed itself correctly to the need to establish error before it disturbed the exercise of discretion on the part of the primary judges. McHugh J made it clear that "neither in its approach nor the resulting order has the applicant shown that the Full Court erred in a way that would call for the intervention of this Court".

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[70] *JEL v DDF* per Holden and Guest JJ at par 152

59. The decision in *JEL v DDF* has been understood to "disavow the notion that special contributions should only be considered where the assets reach the level of many millions of dollars",[71] as was advocated in *Stay*. The view that special contributions should be considered whatever the asset pool has been supported by some commentators. For example, Parkinson has argued:

> "There is no rational basis on which one could argue that special contributions depend on some particular level of success. It remains the case that special contributions will be difficult to demonstrate, and that in the normal run of cases, the Court will readily reach the conclusion that the contributions of the parties should be treated as equal given their different capacities and opportunities."[72]

60. Dickey noted that in *JEL v DDF* "the Full Court held not only that the size of the asset pool was irrelevant to a claim of special contribution but that a special contribution could be made in any form – including through domestic activities".[73]

61. And then *Figgins,* which brings me to the raison d'être of this paper. The parties cohabited for six years. Two weeks into the marriage and following the tragic death of their father, the husband and his sister inherited around $28m. This included a substantial retail business. The husband learnt the business over the ensuing years whilst the company was managed by a Board of Management. At trial the husband's net worth was estimated at $22.5m and the wife received payment of $1.1m. Nicholson CJ and Buckley J delivered a joint judgment and awarded the wife $2.5m. Ellis J differed on the final result.

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[71] P. Parkinson, 'Discretion and Appellate Review: Family property law in 2000', *Family Law Residential 2001: Courting change*, Queensland Law Society, Continuing Legal Education Department, 2001, p 14

[72] P. Parkinson, 'Discretion and Appellate Review', p 14

[73] A. Dickey QC ''Special Contribution' to property and the case of Figgins', *Australian Law Journal*, Vol 77, 2003, pp 575-8 at 575. Some others take a rather cynical view, for example, L Young: see "A Special Rule for 'Special Skill': is it really 'common sense'?" (2001) 7 CFL 189

62. The case of *Figgins* is significant in that it picked up on and referred to English decision making. In their joint judgment, Nicholson CJ and Buckley J referred to the decision of *White,* noting that the judgment was a turning point in English jurisprudence on the issue of future needs and equality. They found that the period during which the husband learnt the business was equivalent to a situation where a partner is supported to achieve a professional qualification. Because of this, they asserted, "[i]t could scarcely be argued that because the rewards of his/her profession came later, the first spouse's contribution should be reduced because his/her earnings were not contemporaneous with the contributions of the spouse. The circumstances of the relationship as a whole must be considered in a more comprehensive way."[74]

63. Dealing with the issue of special contributions, the Chief Justice and Buckley J expressed concern that the doctrine had become prevalent "in the absence of specific legislative direction", especially given the subjective nature of such assessments.[75] They continued that it was "invidious for a judge to in effect give 'marks' to a wife or husband during a marriage."[76] This view has found favour with some commentators. For example, Parkinson wrote:

> "People in intimate relationships confer benefits on one another in all sorts of different ways, not merely in contributing to running the household but also in doing all sorts of other things for one another. It would be abhorrent if the law of property division required people retrospectively to count scores in such matters."[77]

64. At this point, their Honours suggested a re-examination of the concept of special contributions, especially in light of the House of Lords decision in

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[74] *Figgins* per Nicholson CJ and Buckley J at par 50
[75] *Figgins* per Nicholson CJ and Buckley J at par 57
[76] *Figgins* per Nicholson CJ and Buckley J at par 57

White and went on to express the view that the result in *Figgins* at first instance "was both clearly wrong and manifestly unjust in the terms stated in those authorities".[78] They said:

> "106. In reaching this conclusion, we are fortified to some extent by the decision of the House of Lords in *White*. Surprisingly enough, both in argument before her Honour and before us, no mention was made by either Counsel of the decision in *White*. Indeed, neither side appeared to be aware of it until we raised it in argument. They then did make some general submissions about it, but although the matter proceeded into a second day, neither availed themselves of the opportunity to make detailed submissions as to its effect. We do not regard this as precluding us from considering it however, particularly when the opportunity was offered to them to do so in circumstances where we had made it clear that we thought that it was of possible relevance.
>
> 107. We regard this omission as surprising because we think that the case has relevance to the issues in this case. It also has implications going beyond so-called "big money" cases. We say this because some of the principles expressed appear to be of general application, particularly as to the role of women in marriage.
>
> 108. We note that Thorpe LJ expressed the view in *Cowan* [[2001] 3 WLR 684] that the principles laid down in *White* may be confined to "big money" cases. However, we are sure that his references to gender equality were intended to apply to all cases, regardless of the amount of the property in dispute."[79]

65. Nicholson CJ and Buckley J then went further and noted the "pertinent observations" of the House of Lords in *White*. Adapting the following points for an Australian context, they paraphrased part of Lord Nicholls' speech to reveal the following guidelines.

> "● Fairness, which we would equate with the *Family Law Act's* requirement that the result be just and equitable; see also *Mallet* per Gibbs CJ (at 79,111).
>
> - That the contribution in question in the legislation is to the welfare of the family;
> - The absence of discrimination in favour of the money earner and against the home- maker and child carer;
> - The testing of the result against the yardstick of equality of division;
> - The need to provide reasons for departing from equality of division;
> - Greater modern awareness of the extent to which one spouse's business success may have been made possible or enhanced by the family contribution of the other spouse;

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[77] P. Parkinson, 'Quantifying the homemaker contribution…', at p 15
[78] *Figgins* per Nicholson CJ and Buckley J at par 105
[79] *Figgins* per Nicholson CJ and Buckley J at pars 106-8

- Greater awareness of loss of work opportunities resulting from the need to stay home and look after young children;
- The need in the exercise of discretions such as those conferred by this type of legislation to take into account "the human outlook of the period in which they make their decisions" and the need to remember that "the law is a living thing moving with the times and not a creature of dead or moribund ways of thought" (*Porter v Porter* [1969] 3 All ER 640 at 643-644 per Sachs LJ)."[80]

66. Adopting the interpretation of *White* and the subsequent and equally significant English case of *Cowan*, the majority said that *White* is about "fairness rather than equality". Nicholson CJ and Buckley J went on to say that:

> "132. … the important concept that can be said to emerge from *White* is that, in order to test whether a result is fair, or in Australian terms just and equitable, it is important to ask whether the husband and wife are being treated equally. It states in the clearest terms the modern recognition of equality of the sexes and the need to abandon all forms of discrimination.
>
> 133. In the present case we think that the emphasis given by *White* to gender equality is important in testing the overall result. We think that the lesson to be learned from *White* is that it is a major error to approach these cases upon the basis that one arrives at a figure that is thought to satisfy the needs of the wife and give the balance to the husband.
>
> 134. In some cases that may produce an appropriate result but in many others it is likely to be productive of a grave injustice. We reject the concept that there is something special about the role of the male breadwinner that means that he should achieve such a preferred position in relation to his female partner. To do so is to pay mere lip service to gender equality. Marriage is and should be regarded as a genuine partnership to which each brings different gifts. The fact that one is productive of money in large quantities is no reason to disadvantage the other."[81]

67. Ellis J agreed with much of the judgment of Nicholson CJ and Buckley J on contributions. As counsel in the Appeal had not referred the Court in any detail at all to the decision in *White*, Ellis J refrained from examining it. Instead, he turned to the provisions of the *Family Law Act* and said:

> "203. In my view, the Act is expressed in gender neutral language. In a consideration of the just and equitable requirement referred to in s 79(2), the Court must take into account and assess the matters set out in s 79(4) in a manner which does not on the one hand discriminate against or on the other hand advantage a spouse on

[80] *Figgins* per Nicholson CJ and Buckley J at par 113
[81] *Figgins* per Nicholson CJ and Buckley J at par 132-134

> the basis of gender or on the basis of the role undertaken by the spouse within the marriage.
>
> 204. Further, in the exercise of the discretion conferred by s 79 of the Act, the Court does not commence with an assumption that the relevant property should be divided between the spouses equally or in some other pre-determined proportion.
>
> 205. In the exercise of the discretion conferred by s 79, it is not open to the Court to adopt an approach whereby an order, in terms of a sum of money and /or a percentage of the net value of the property of the spouses, is made in favour of one spouse based on an assessment of his/her needs, and the balance then remaining of the property is by order distributed to the other spouse."[82]

68. Some commentators expressed dissatisfaction with the decision. I have already referred to Dickey's comment that the Full Court had not said what the law is, but instead had expressed "what the law probably is not".[83] He also advanced the obvious question that if the doctrine of special contributions was no longer relevant to property division, then given the provisions of s 79(4), how is the court to regard such a contribution when raised as an arguable fact in issue either in terms of exercising special skill or in generating great wealth? Is the answer to simply ignore special talent, and special contribution and hold supreme the philosophical principle of equality which, as Dickey observed, was a constant theme in the decision of *Figgins*[84]? Dickey also noted that in their judgment, that what the Full Court had marked:

> "…for reconsideration is the notion of special contribution in a qualitative rather than a quantitative sense. There is no suggestion that a spouse cannot make a contribution that is particularly significant by virtue of the extra work or extra effort that went into it."[85]

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[82] *Figgins* per Ellis J at pars 203-205
[83] A. Dickey, QC, ''Special Contribution' to property and the case of Figgins', at p 575. See also Parkinson *'Quantifying the Homemaker Contribution in Family Property Law'* especially at pp 49-50
[84] A. Dickey 'Special Contribution..' at p 577
[85] A. Dickey 'Special Contribution..' at p 575

69. The decision has been questioned for a number of reasons, none the least of which is that it raises uncertainty. This arises from the continual review of certain principles by differently constituted Full Courts.

> "How can family lawyers give positive advice to clients if well-established principles of law are subject to review? How can family lawyers at this very moment give firm advice on a claim of special contribution in light of the uncertainties that have now been created by the Full Court in *Figgins*? The writing might be on the wall in respect of the notion of special contribution, but it's not yet set out in any final decision."[86]

70. On the other hand, Parkinson argued that the doctrine of special contributions currently operated as an exception to the principle that contributions by the efforts of the parties during the course of the marriage should be given an equal value. Whilst commenting that such a notion might be objectionable for a number of reasons, it was nonetheless not a valid objection that the homemaker contribution was thereby undervalued.[87]

CONCLUSION

71. As Parkinson properly concluded, in my view, the "inexorable logic" of s 79(4)(a) to (c) of the Act as it presently stands is that credit be accorded for financial success derived from contribution founded upon talent.[88] In cases before the Court thusfar, it is the husband who translated his talent (a "special" skill) into financial success. As the law presently stands, it is in those circumstances that any perceived view of gender inequality will be arguably inevitable. However, that is the requirement of the Act, which in those rare cases, the subject of which this paper embraces, is a

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[86] A. Dickey 'Special Contribution..' at p 578
[87] P. Parkinson "Quantifying the Homemaker Contribution in Family Property Law" at p 27
[88] P. Parkinson "Quantifying Contributions" *Handbook of the 10th National Family Law Conference (Melbourne) 2002 p 17 – 41* at p 20

contribution connected to talent or special skill, and not luck[89] or windfall[90]. It is, after all, a function of the evidence. If the Court were to undertake its task by adopting an approach of "equality is equity", it would ignore its statutory mandate, the blueprint of its task and improperly disregard the precedential authority of *Mallet* and the clear decisions of the Full Court to this date.

72. As I pointed out earlier in this paper, it was the view of Parkinson that the doctrine of special contribution was a "necessary exception to the common practice of the Court in quantifying the homemaker contribution as being equal" to the income earning spouse during the subsistence of the marriage.[91] This is so despite the conceptual framework of s 79 treating marriage as a partnership recognising the traditional dichotomy of roles mutually agreed upon and undertaken by the parties. As Parkinson said, if the "court is going to assess contribution as the Act requires then it has to make room for special talent".[92]

73. Despite whatever philosophical aim *Figgins* seeks to achieve within the fabric of the decided cases both in Australia and those recently to hand in England, they each, upon proper analysis, make room for the doctrine which in practical reality is a "rare breed of case" representing a small percentage of all property cases before the Court.[93] It is to be remembered that s 79 is not concerned with "division" of property within

[89] eg. *Zyk v Zyk* (1995) FLC 92-644 (a Tattslotto win)
[90] eg. *Zappacosta v Zappacosta* (1976) FLC 90-089 (land re-zoning)
[91] P. Parkinson "Quantifying the Homemaker Contribution in Family Property Law" at p 26
[92] P. Parkinson "Quantifying the Homemaker Contribution in Family Property Law" at p 26
[93] Ross and Moore "'*Figgins'* A New Direction or Just Rhetoric?" (supra) at p 42

the marriage, but "alteration" of existing rights[94] within the umbrella of its provisions which specifically provides for an analysis of contribution.

74. The issue of special contribution has excited both lively debate, written commentary and in one isolated instance, intemperate criticism.[95] I have earlier set out the principles[96] laid down in *JEL v DDF* for guidance to trial judges which is both consistent and appropriate with what the High Court had to say in *Norbis.*[97] As I see it, the criticisms unveiled by Fogarty may have been strongly influenced by his personal view of equality within marriage.[98] His entitlement to that view is something with which I do not cavil. It is the failure to properly consider and apply the provisions of the Act and the precedential authority of the High Court in *Mallet* that draws my comment and criticism.

75. If an evidentiary foundation is established, then it may be readily argued that a special ("extraordinary" or "exceptional") contribution is personal. It is a solitary endeavour and not a collective exercise, other than to properly recognise that the homemaker, by his/her contribution released the other from the home environment to pursue that talent, discipline and responsibility. Then the inevitable question: What weight is to be attached to that?

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[94] per Nygh J, *Aroney v Aroney* (1979) FLC 90-709 at 78,784

[95] this was commented upon by M Bartfeld QC in his article "*Don't Lynch the Messenger. The Evaluation of Contributions in the Wake of JEL v DDF"* (2002) 8 CFL 86 in reference to a paper by J Fogarty "*Never Mind the Quality – Feel the Width, Special Contributions"* (Conference Handbook, Television Education Network Pty Ltd, March 2002). See footnote 19 supra.

[96] *JEL v DDF* at par 152, page 88,334

[97] CLR, per Mason, Deane JJ at p 519-20 and Brennan J at p 538-39; see also *A v A: Relocation Approach* (2000) FLC 93-035; *Re. F: Litigants in Person Guidelines* (2001) FLC 93-072 and *White v White* (2000) 1 FLR 981 at 984E per Lord Birkenhead

[98] See for example, *Potthoff v Potthoff* (1978) FLC 90-475 at p 77,446 and 17 years later, *Waters v Jurek* (1995) FLC 92-635 at p 82,376

76. It is patently obvious that both proper and due regard is to be paid to the contribution of the homemaker and parent role as one of the statutory factors for consideration in the overall and broad discretionary assessment of all the facts placed before the Court. Parkinson comprehensively addresses this issue,[99] which is a function of the evidence. Its significance was clearly articulated in *Ferraro,* recognising that in long marriages the roles undertaken by the parties are defined by them at an early stage and in that case the finding was that they each performed their role at a high level and without criticism of the other.[100] It is plain that there should be no prejudice or advantage to either party, whatever the division of labour.

77. A helpful description of the application of the division of roles undertaken by the parties, and apposite in my view to the usual run of property cases before the Court is that expressed by Fogarty J:[101]

> "In most marriages, there is a division of roles, duties and responsibilities between the parties. As part of their union, the parties choose to live in a way which will advance their interests – as individuals and as a partnership. The parties make different contributions to the marriage, which the law recognises cannot simply be assessed in monetary terms or to the extent that they have financial consequences. Home maker contributions are to be given as much weight as those of the primary bread winner."

78. This was taken up by Ross and Moore[102] arguing that if a marriage was to be viewed as a partnership, then "why should there be one rule for the cases involving a high degree of wealth, and a different rule for those cases where the parties have not been fortunate enough to accumulate that kind of wealth?" In most cases (where there are no special contributions or, for example, issues of inheritance or direct gift) there should be no difference, and I agree with the authors who went on to say:

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[99] P. Parkinson "*Quantifying the Homemaker Contribution In Family Property Law",* (supra) at p 1
[100] *Ferraro v Ferraro* (supra) at p 79,566
[101] *Waters v Jurek* (supra) at p 82,379

> "In all cases, regardless of the size of the pool, why should the contribution of the husband and the wife in their different spheres be valued otherwise than equally **unless the contribution of one of the parties is indeed extraordinary?**" (my emphasis)

79. Whether the descriptive term is "extraordinary", "exceptional", "special" or "entrepreneurial" matters not, for it will be identified by the evidence and measured against all those other contribution factors addressed in s 79(4) of the Act. Those cases to which I have referred, being the antecedents to *JEL v DDF* which have dealt with this doctrine, made it clear that such a contribution justified a conclusion being recognised outside the "normal range". So too the recent English cases which, notwithstanding the limitations sought to be imposed, nonetheless leave the door ajar for consideration of such a contribution as part of the evidence.

80. I have already referred to the decision of the House of Lords in *White* and dare to make the observation that given the not unusual factual circumstances of that case, the result may have been no different had it been assessed within the provisions of s 79 of the *Family Law Act*, and perhaps, a more generous outcome may have been the result. Some force for this comment may be gathered from the speech of Lord Cooke of Thorndon who expressed doubt that the contributions made by the husband's father early in the marriage justified a differential of some 20% of the asset pool, and that the order in favour of the wife of £1.5m "was probably about the minimum that could have been awarded … without exposing the award to further increase on further appeal"[103]. Speaking for myself, and having regard to the contribution made through the husband's resources (in that case his father), I would not have been surprised at an

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[102] "*Figgins – A New Direction or Just Rhetoric?"* (supra) at p 39

award of some 45% in the wife's favour if the proceedings had been considered within the provisions of s 79 of the *Family Law Act*.

81. The gateway for consideration of the doctrine of "special" contribution was left open by Lord Nicholls when he said:

> "As a general rule, equality should be departed from only if, and to the extent that, **there is good reason for doing so**."[104] (my emphasis)

So too Lord Cooke, who "gratefully adopt(ed) and underline(d)" that which Lord Nicholls had to say.[105] I might also add Lord Nicholls noted that the need to consider and express reasons for departing from equality would assist the parties and the courts to focus upon the requirement to ensure the absence of discrimination. It remains, as I have said, a question of evidence and that the discretionary exercise in England governed by "fairness" (within the provisions of their governing statute) and with "equality as a yardstick" does nonetheless in my view admit recognition of special contribution and skill.

82. And so it was with the subsequent decision of the Court of Appeal in *Cowan.* In that case, having extensively discussed *White,* it was made readily apparent that the extent of the husband's contribution (founded on the evidence) merited departure from the yardstick of equality, recognising in "fairness", that some cases "requires recognition of the product of the genius with which only one of the spouses may be endowed".[106] Albeit more qualified, Mance LJ reached the same conclusion recognising "special or exceptional" circumstances.[107] Significantly, in my view,

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[103] (2000) 2 FLR at p 999
[104] (2000) 2 FLR at p 898
[105] (2000) 2 FLR at p 999
[106] Thorpe LJ at p 216, par 67 with whom Robert Walker LJ concurred
[107] at p 240, par 156 and "special skill"

Thorpe LJ made it quite clear that recognition of an entrepreneurial contribution was not "discrimination by the back door"[108]. Any departure from a position of equality will depend upon the facts and circumstances of each case, that is, an assessment of the evidence, a point clearly recognised by his Lordship who said they "inevitably proved to be too legion and too varied to permit a listing or classification".[109]

83. In contrast to the position in Australia, there have been, as I understand it, quite a number of English decisions dealing with "big money".[110] In Australia, the position is somewhat more contained, at least until the dicta in *Figgins* has been fully argued in circumstances predicated upon an appropriate factual scenario. This has been made more readily apparent with the decision of *Lambert*[111] where the English Court of Appeal endorsed the principle which assumes equality of contribution, justifying an equal division of property in a marriage of long duration. It was reasoned that it would be "discriminatory" to value the money-making contribution of one party in a long union higher than the homemaker/parent contribution of the other. The Court there drew upon *Figgins* for support, extensively citing the joint judgment of Nicholson CJ and Buckley J with its associated criticism of *JEL v DDF.*[112]

84. On the issue of special contributions in that case, Thorpe LJ said that:

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[108] at p 216, par 67
[109] at p 212 par 53; see also par 57
[110] see Mostyn QC "Small Earthquake in Chile: not many dead"; paper delivered in Hong Kong Dec. 2003
[111] *Lambert v Lambert* (2003) 2 WLR 631; (2003) 1 FLR 139
[112] see (2003) 1 FLR 139 esp at par 24

> "… save in the most exceptional and limited circumstances, the danger of gender discrimination resulting from a finding of special financial contribution is plain."[113]

Retreating somewhat from what his Lordship earlier had to say in *Cowan*, he also expressed wariness of the issue of special contribution and that:

> "… for the present, given the infinite variety of facts and circumstances, I propose to mark time on a cautious acknowledgment that special contribution remains a legitimate possibility but only in exceptional circumstances. It would be both futile and dangerous to speculate upon the boundaries of the exceptional. In the course of argument I suggested it might more readily be found in the generating force behind the fortune rather than the mere product itself."[114]

85. The head note summarises the decision in very clear terms recording that there be an end to the "sterile suggestion" that the breadwinner's contribution weighed heavier that the homemaker's. Such contributions were "intrinsically different and incommensurable". A "good idea, initiative, entrepreneurial skill and extensive hard work" were insufficient to establish a special contribution. There may be cases "where the product alone justified" such a conclusion; but "absent some exceptional and individual quality in the generator of the fortune a case for special contribution must be hard to establish".

86. I would imagine that there now exists within the profession in the UK some real discomfort arising from the tension between the competing decisions of *Cowan* and *Lambert*, particularly whether the latter has, through a back door approach, introduced an assumption of equality. The jurisprudential retreat is transparent and must be of concern to the profession. For myself, it is difficult to understand and I suspect that dark clouds of speculation may now loom ominously over the future of any argument

[113] *Lambert* at par 45
[114] *Lambert* at par 46

introducing special contributions as a fact in issue, notwithstanding the door being kept ever so slightly ajar for entry.

87. As for the position in Australia, and for the most obvious of reasons, the "comment" (for juridically, it can have no more force than that) of Thorpe, LJ when referring to *Figgins,* namely "Perhaps Nicholson, CJ, who seems poised to banish the phenomenon, may have found the better path",[115] is surprising. Be that as it may, it is for the Parliament of Australia or the High Court in the result to determine the role, if any, of the doctrine of special contribution in family law in this country.

88. In the course of this paper I have drawn upon the judgments handed down in *Cowan* (which considered *JEL v DDF*) and have had regard to what may arguably be seen as a judicial retreat by Thorpe, LJ in *Lambert* from that expressed in *Cowan*.[116] His Lordship made it quite clear that he considered it regrettable that neither at trial nor on appeal was there any argument on the "validity of principle" concerning the "legitimacy of a departure from equality on the basis of exceptional financial contribution". As I have earlier remarked, Thorpe, LJ drew upon what Nicholson, CJ and Buckley, J had to say in *Figgins* and their stated position on *JEL v DDF*, and seemingly reached the view that the doctrine of special contributions was a "phenomenon".[117] It has certainly never been so labelled in Australia and any use of such an epithet, I suggest, would be plainly rejected as inappropriate. Thorpe, LJ apparently justified his newly

[115] *Lambert* at par 46
[116] *Lambert* per Thorpe, LJ at par 43-46
[117] *Lambert* per Thorpe, LJ at par 46

adopted position in *Lambert* on the basis he heard "full and reasoned" submissions against the concept of special contribution.[118]

89. But that was never the case in *Figgins*. It may be trite, but nevertheless it is correct to say that the doctrine of special contribution was not argued, nor was it "reasoned" in any way in that case. What Nicholson CJ and Buckley J said was mere unsolicited obiter which should, given the circumstances, hold no more significance than that. I suggest that the cautious refusal of Ellis J to entertain the debate enjoined by their Honours was more appropriate, particularly given established precedent and the fact that no invitation was taken up at such a late time in the appeal process to sensibly debate this controversial issue which clearly excited their Honours' attention. It cannot thus be concluded, by any measure, that what was said by their Honours resulted from "full and reasoned" argument reflecting both sides of the spectrum.

90. The concept of a special or exceptional contribution is one of common sense that sews itself seamlessly into the fabric of s 79 as presently enacted and within that carefully expressed by the High Court in *Mallet*. The wording of s 79 is clear and unambiguous and does not invite a package deal approach to contribution issues simply upon the socio-economic partnership of marriage. A trial judge is entitled, indeed bound, to make an assessment as to the respective worth of an arguable special contribution when placed as a fact in issue. It is a task that cannot be avoided.

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[118] *Lambert* per Thorpe, LJ at par 45

91. In *Farmer v Bramley*[119] I expressed the view that an alteration of property interests pursuant to s 79(1) of the Act was not an invitation "to engage in an unbounded exercise in distributive justice."[120] As the law presently stands, a trial judge is charged with the onerous statutory obligation to undertake his/her assessment in a structured way within the relevant provisions of s 79. It is having regard to those matters that the Court may adjust property interests in a just and equitable manner. Over 20 years ago, Nygh, J had this to say[121]:

> "Section 79, as I have indicated in argument, does not entitle the Court to adopt 'a soup kitchen' approach. The Full Court has made it quite clear in *Currie and Currie* (1976) FLC 90-101 … that the reference in sec 79(2) to considerations of justice and equity is controlled by the factors set out in sub-sec (4). It is, therefore, not an open sesame for the Court to administer such justice as it thinks fit. That, indeed, would be a grievous error."

92. In a number of significant decisions, the Family Court has made it clear that s 79 of the Act is not a source of "social engineering" or as a means of "evening up" the financial positions of the parties.[122] The legislation does not say that the Court should do "whatever is just and equitable". The legislation provides that the Court should not make an order altering the property interests of the parties unless it is "just and equitable" to do so. Section 79(2) is a clear limitation on the power of the Court to alter interests in property. It is not an open ended jurisdiction to do so based upon subjective notions of a fair result or "unbounded distributive justice". One need go no further that to recall the words of Wilson J:

> "The objective of the section (sec 79) is not to equalise the financial strengths of the parties. It is to empower the court … to effect a re-

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[119] (2000) FLC 93-060 at p 87,972
[120] see Gleeson CJ and McLelland J in Eq. in *Evans v Marmont* (1997) DFC 95-184 at p 77,610
[121] *Hirst v Rosen* (1982) FLC 91-230 at p 77,251
[122] see *Kennon v Kennon* (1997) FLC 92-757 at p 84,303; *Clauson v Clauson* (1995) FLC 92-595 at 81,912; *Waters v Jurek* (supra) at p 82,376 per Fogarty, J and *Lyon v Bradshaw* (Unreported Full Court – Appeal No. WA21/1996 16 May 1997

> distribution of the property of the parties if it be just and equitable to do so."[123]

93. One ought not diminish the importance of the commanding or authoritative words contained in s 79(2), namely that the Court shall not make an order unless it is "just and equitable to do so". In *Mallet*[124], Dawson J described these words as the "overriding requirement" of s 79. Whilst, in the ordinary and more common fare of the Court when dealing with property, the usual result when assessing contribution will achieve equality and then follows an adjustment, if any, pursuant to the provisions of s 75(2), justice and equity demands an evaluation of special or exceptional contribution when it is properly raised as a fact in issue. Any long partnership in marriage too will bear assiduous consideration.

94. Where no special skill is an issue and the marriage partners have divided their efforts and responsibilities between themselves within their respective spheres, there is a broad generalisation that the accretion of wealth through windfall, luck, prudent investment over a lengthy marriage or the wise and patient building-up of a successful business, that such contributions and activities may be regarded for the joint benefit of the parties. In those circumstances, the wife has, through her role as a homemaker/parent made a substantial contribution. Indeed, in such cases she may have herself foregone personal opportunities to work, generate assets and be a productive economic contributor to the marriage. It is in these circumstances that it matters not, given the evolution of the law, which of them earned the money and built up their common wealth. Cases of that nature are legion and are not the subject of this paper. The

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[123] *Mallet* FLC (supra) at p 79,127

underlying and fundamental thrust of the issue of a special contribution is expressed in the words of Mance LJ in *Cowan's* case set out in the introduction to this paper. It becomes a significant fact in issue that warrants evaluation.

95. It has been argued that special contributions, as a function of evidence, may be difficult to establish. That in my view is an argument with which those who sit in trial work would join issue. The judgments at first instance for example in *Ferraro*, *McLay, Stay, Phillips* and *JEL v DDF* demonstrate the assessment of the complex evidence from which findings of a special contribution were made. The issue of proof was considered by their Honours in *Figgins* when they said that it was "almost impossible" to determine such questions as: "Was he a good businessman/artist/surgeon or just lucky?", and "Was she a good cook, housekeeper, entertainer or just an attractive personality?"[125] That surprises me if it is intended to apply to those uncommon cases assessing special contributions as a fact in issue. It would not be difficult to compare the skill of an outstanding modern painter with less successful contemporaries and lead evidence of that painter's special skill. And what about a superstar sportsperson (dare I say, tennis player)? Evidence underpinning the rare commercial competence of such businessmen recognised in *Ferraro*, *JEL v DDF, Phillips* and *McLay,* whilst testing, is part of the judicial function. So too any issue of whether or not luck or windfall was the basis for the creation of a substantial asset base.

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[124] at CLR p 647; FLC at p 79,132
[125] *Figgins* at p 89,295

96. It is a question of evidence to determine whether the fact of a successful business (at the time of hearing) was the product of ordinary commercial growth and wise administration, or the input of innovative, exceptional commercial discernment and skill. The issue raised by Dickey[126], which he described as "crucial", was: "at what point and in what circumstances does the exercise of business acumen cease to be within the ordinary range and become exceptional?". That too is a function of the evidence and the exercise of judicial discretion which, no doubt, whilst testing, posed no difficulty for the judges at first instance in the cases to which I have referred.

97. As to the contribution as a home maker and parent, that is a matter rarely brought into issue as a practical consideration in the real world of litigation. Appropriate concessions are generally made. The newly erected argument of gender discrimination will be a matter for assessment and consideration when placed before the Court as a fact in issue and necessarily particularised by the party asserting the same. That too will be a function of the evidence should it fall within the statutory provisions of s 79(4).

98. The evidence placed before the court in circumstances where special contribution and skill is a fact in issue is nonetheless necessarily detailed and complex. It appears to me that this is a fact not fully appreciated nor understood by some commentators, particularly those opposed to the doctrine. An isolated, perhaps unfortunate example may be seen in an article which described the facts in *JEL v DDF* as follows:

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[126] "'*Special Contribution' to Property and the case of Figgins"* (supra) at p 576

> "The husband in this case came across an opportunity to exploit a goldmine through his employment. He pursued the endeavour, it was successful and in a short period about $35m was generated. Thereafter he engaged in various business activities, some of which were successful, some of where were not."[127]

99. Despite "scouring" the case, the author wrote that nothing was said of what was "special" about the husband's efforts or talents, commenting that the court did not really assess contributions, but merely assumed that "massive wealth creation demands a special skill, though to fit with the legislation it increasingly uses the term 'contribution'". In my view, such a threadbare analysis of the facts and contentious opinion warrants caution. Any "scouring" of the voluminous affidavit evidence, the transcript of the oral evidence and submissions in court (all spanning nearly 2 weeks) together with a careful reading of the long detailed judgment of the trial Judge would correct the bald assertions upon which the commentator relies.

100. There is an additional matter of importance attached to the homemaker/parent role that was expressed by Thorpe LJ in *Lambert*[128]. There, dealing with a long marriage, his Lordship said its relevance:

> "is not just the duration of 23 years but the fact that they span the most productive period of the wife's life from 22-45. Not only are those years of child bearing and rearing but those are the years in which an adult develops talents and expends the force of energy in the chosen work. The wife had a modest business which she gave up. What sort of independent career she sacrificed is a matter of speculation."

That point appears to me to be well made, and whilst the court is not dealing with a compensatory jurisdiction, such issues fall comfortably within the prospective adjustments pursuant to s 75(2)(k) of the Act.

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[127] L Young "A Special Rule for 'special skill': is it really common sense?" (2001) 7 CFL 189 at 193

[128] *Lambert* at part 56

101. In an interesting paper delivered in November 2002,[129] *Figgins* was advanced by the Chief Justice as the favoured option to *JEL v DDF*. One is left to speculate whether the views expressed were one further step to banish the "phenomenon" of special contribution, a chronicle foretold by Thorpe LJ in *Lambert*?[130] It is unfortunate that this remedial drive founded principally upon alleged gender discrimination to achieve equality may have had an effect upon the "small money" case, a fact which was acknowledged by the authors as follows:

> "There has been some recent research conducted in the UK 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. 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."[131]

102. Consistent with principle, is there a possibility that the opening of Pandora's box to release the *White/Figgins/Lambert* mix may have a carry over effect upon the standard ordinary property case in Australia? I think not, because, unlike the English Matrimonial Causes Act, the corresponding Australian legislation has the acknowledged and well understood safety net of s 75(2).

103. In particular, I join issue with the comment of the learned authors who assert that:

> "As we see it, the problem with this principle (special contributions) 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

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[129] "Resolving Property Disputes – An Anglo-Australian Contrast" presented by Nicholson CJ, co-authored with Ms Wood, Barrister, London; 16 November 2002 *Family Law Practitioners of Western Australia*

[130] *Lambert* at par 46

[131] (Fn 129) at p 17

> the *Family Law Act* is there a reference to 'special contributions or considerations'."[132]

That has never been the case in Australia, in total contrast to that in England prior to the decision in *White*. It surprises me that such a platform was erected in this important debate. In particular, when such an argument was sought to be advanced in *Ferraro*, it was specifically, and I might add, properly rejected.[133]

104. The authors further comment that "nowhere in the *Family Law Act* is there a reference to "special contributions or considerations".[134] Nor is there a reference to gender discrimination which, in my view, is so obvious as to barely warrant scrutiny. The structure of s 79(4) is such as to require the trial Judge to address his/her attention to a series of well-structured contribution factors, and as Mance LJ said in *Cowan,*[135] there was no sensible basis for restricting consideration to cases of "stellar contributions". His Lordship properly acknowledged that there was "probably one continuous spectrum extending from the entirely ordinary to the stellar".[136]

105. The doctrine of special contribution has been part of the Court vocabulary since *Mallet* in 1984 and has not, in my view, contrary to that of the learned authors, opened "the door to an invidious analysis of contributions".[137] I reject the suggestion that such a doctrine would lead the courts to more readily classify contributions as special, "because society as a whole tends to attach greater financial worth to financial

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[132] at p 7-8
[133] *Ferraro v Ferraro* at p 79,561
[134] (Fn 129) at p 8
[135] *Cowan* at p 241, par 161
[136] *Cowan* at p 241, par 161

contributions, and thereby introduce(s) gender bias via the back door".[138] The trial Judges are the gatekeepers of the facts in issue and alert to avoid such an event, they being charged to consider and assess the provisions of s 79, and not the "philosophy" behind the English Matrimonial Causes Act which hitherto remained where it is, 12 000 miles away.

106. It is proper that the House of Lords in *White* moved fairness and equity into matrimonial property assessments, acknowledging there should be no bias in favour of the money earner against the homemaker/parent, and that (within the perimeters of their legislation) as a general guide, equality should be departed from "only if and to the extent that, there is good reason for doing so."[139] The problem is, that within those faraway shores there now remains an unhappy tension between *Cowan* and *Lambert* and it is correct for the learned authors to conclude that *Lambert* undoubtedly signalled "a generous pouring of cold water" upon the doctrine of special contributions.[140] But does that simply end the matter for Australian purposes? I think not.

107. The House of Lords in *White* entered into the arena after an absence of some 30 years, and for one, I would welcome a consideration by the High Court of this significant debate having regard to what was said in *Mallet*, the clear terms of s 79 and the steady jurisprudence following *Mallet* in respect of which *Figgins* alone casts doubt. There is now imported into the commentary of those who seek to banish the doctrine a view which

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[137] (Fn 129) at p 8
[138] at p 8
[139] per Lord Nicholls, (2000) 2 FLR at p 989
[140] at p 19

appears to recognise the unhappy tensions simmering in the United Kingdom with the subsequent advent of *Lambert*.

108. It appears to me, notwithstanding what *Figgins* has to offer by way of obiter, there yet remains sufficient within the English authorities to sensibly maintain support for the doctrine of special or exceptional contributions espoused from *Ferraro* through to *JEL v DDF*. As I have already pointed out, Lord Nicholls in *White* (a case not dealing with special contributions) made it clear that as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. What *White* helpfully advanced was to acknowledge a greater awareness in society of the value of non-financial contributions to the welfare of the family and the opportunity to succeed that such a contribution may afford the other party.

109. It is worthwhile to recall that in *Cowan*, Thorpe LJ expressed the view that "fairness" permitted, and in certain cases required a recognition of "the product of the genius" endowed by one spouse only, acknowledging, in that case the "husband's achievement, which clearly for their scale depended upon his innovative visions as well as upon his ability to develop those visions".[141] So too, Robert Walker LJ spoke of the husband being "an exceptionally active, determined and innovative businessman",[142] concluding that the case was unusual, describing the husband's "contribution (in terms of entrepreneurial flair, inventiveness and hard work) as being truly exceptional".[143]

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[141] at (2001) 2 FLR 192 p 216 par 67
[142] at (2001) 2 FLR 192 at p 223 par 94
[143] (2001) 2 FLR 192 at p 226 par 106

110. I have, with the introduction to this paper referred to what Mance LJ had to say in *Cowan,* and his erudite description of the intrinsic properties of a special contribution. In 1999[144] I reviewed the principal authorities to that time and posed the question whether or not the court would elect to take the path of reward for exceptional effort or choose to view marriage as an equal partnership notwithstanding unequal contributions. The concepts were brought into account at par 144 of *JEL v DDF* and were acknowledged by Mance LJ in *Cowan,* where his Lordship had this to say when considering *JEL v DDF*:

> "It spoke of a tension between the concepts of recognising 'special factors' and of standardising contribution, and approved statements in an extra-judicial paper by Guest J of 1999 to the effect that the statute required such an evaluation and that a contrary view imposes 'a moral duty to share equally regardless of contribution', because of the fact of marriage, denying or at least minimising 'the role of exceptional skill and intelligence in the production of wealth' and failing to 'validate a recognition of an individual's right to the value of his or her innate skill and intelligence'."[145]

111. His Lordship then went on to add a reservation that the passages should "not encourage attempts at detailed examination and invidious comparison of the respective contributions of spouses on the domestic and business front to become commonplace in this jurisdiction"[146]. With that proposition, there can be no dissent. He went on to conclude that only where there were "special or exceptional circumstances" affecting the contribution made on either side should the court be ready to make the comparison, and even then, only on a broad basis, adding:

> "… But, if and when it is concluded that one spouse has made an exceptional contribution, then the court can and should be prepared to consider its impact on the appropriate order."[147]

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[144] Special Contributions: Inheritances, Windfalls and the like – are they special? *Family Law Residential, Hyatt Coolum* 1999
[145] *Cowan* at par 168
[146] *Cowan* per Mance LJ at par 169
[147] at par 169

112. Even in *Lambert*, whilst expressing the wariness to which I have earlier referred, Thorpe LJ nonetheless also acknowledged the clear fact that there may be cases:

> "… where the product alone justifies a conclusion of a special contribution but absent an exceptional and individual quality in the generator of the fortune a case for special contribution must be hard to establish."[148]

113. Notwithstanding his Lordship's caution, what he said falls nonetheless within my introductory citation to this paper of Mance LJ in *Cowan*. Further, experience within the profession recognises that the doctrine of special contributions is difficult to establish, and, as I have made clear earlier in this paper, is a rare investigation before the Court.

114. In my view, the obiter in *Figgins* concerning the doctrine of special contributions (particularly at par 57 and 134) and which was not argued nor reasoned in any way as such before the court, whilst concerning, given the development of the doctrine to *JEL v DDF*, cannot on any rational view without more, render "a quarter of a century's family jurisprudence into antediluvian obsolescence", to adopt the phrase of Robert Walker LJ in *Cowan*.[149]

115. The doctrine of special contribution offers a justifiable recognition of a special contribution derived from exceptional skills and effort, acknowledging that in some few cases the production of discrete capital or assets is not really a collective effort at all levels under the philosophical patronage of the partnership of marriage. It validates recognition of an individual's right to the value of his or her innate skill and intelligence. Such an argument is open as a contribution issue within the framework of

[148] *Lambert* at par 52

s 79. It is a material consideration for assessment. It is not a point scoring exercise. It becomes a fact in issue that should be properly considered and weighed alongside the homemaker/parent contribution, taking into account that the contribution of the latter afforded the other party the opportunity to do so. It is both "fair" and "just and equitable" for the court to properly consider such a contribution. It is in my view not sexist, not gender discriminatory, nor is it gender biased. Any direction to property distribution that fails to give weight or proper weight to this specific class of contribution in the bare name of equality carried from the fact of marriage or the threat of discrimination would be unfortunate indeed. It is, arguably, an impermissible stride towards a presumption of equality. Some may say, it would result in the "dumbing down" of family law.

116. No doubt the de-constructionists are battering on the gate, but until such time as there are legislative changes to s 79 or the intervention of the High Court, the law remains that as set out in *JEL v DDF* and its antecedents.

The Hon. Justice Paul Guest

July 2004

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[149] (2001) 2 FLR 192 at p 218 par 75