

**FAMILY FARMING AND PROPERTY SETTLEMENTS UNDER THE  
FAMILY LAW ACT 1975 AND THE CATEGORY OF ‘SPECIAL  
CONTRIBUTIONS’**

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I RURAL IDEOLOGY AND FAMILY FARMING

An analysis of the history of rural property settlements in Australia reveals that women have generally not received what may be considered a ‘fair share’ of rural property following divorce. The reasons for women’s exclusion from a fair share in property settlements are not always apparent from legal judgments. Some critiques of family law have suggested that one reason is that their contributions to the farm have been seen as domestic rather than financial.<sup>1</sup>

While handing over the farm to a successor is a major transition in family farming, another ‘transition’ with ‘family property’ may be reflected in divorce cases. Women often lose out in such cases as they may have married into a farming family and stand to lose even more than their husbands, should the farm have to be sold or should they have to move off the farm. The situation may be exacerbated if the husband and wife worked on the farm for many years, while the title was still held in the name of the husband’s parents. At the same time, women often fare badly from divorce, as they are sometimes left without adequate support. After many years on the farm, women are sometimes left standing with two ‘empty hands’, no place to live and little sympathy from the community as regards their needs.<sup>2</sup>

Divorce settlements may be problematic in family farming cases because family farming represents a way of life that is deeply rooted in a marital economy where land was generally transferred within a form of patriarchy. Stable family relations are an important organising principle of agricultural societies. Indeed, in rural areas marriage is considered essential to what is regarded as ‘normal’.<sup>3</sup>

Patriarchal structures and relations have not been eradicated in Australian rural society.<sup>4</sup> Women are implicated in the reproduction of those structures by contributing

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<sup>1</sup> This was noted by the Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69 (1994) 221–224. While there has been a lack of research in this area, these earlier findings have been confirmed by Diane Luhrs, *Daughters of Farmers: Issues in Farm Inheritance* (Honours Thesis, Monash University, 2012). See similar overseas results in Joseph Kary, ‘Farmland Free Markets and Marital Breakdown’ (1992) 11(1) *Canadian Journal of Family Law* 41; Peter Jacobson, ‘Murdoch v Murdoch: Just About What the Ordinary Rancher’s Wife Does’ (1974) 20 *McGill Law Journal* 308; Marit Haugen, Berit Brandth and Irene Follo, ‘Farm, Family, and Myself: Farm Women Dealing with Family Break-up’ (2015) 22(1) *Gender, Place and Culture* 37.

<sup>2</sup> Luhrs, above n 1.

<sup>3</sup> Jo Little, ‘Constructing Nature in the Performance of Rural Heterosexualities’ (2007) 25(5) *Environment and Planning D: Society and Space* 851.

<sup>4</sup> This is a well-researched topic amongst rural sociologists in Australia, who have indicated that there is a shift in the position of women in agriculture, typified by a trend for women to take up outside employment and to own their own farms. At the same time, more children are taking up tertiary education and there is a greater diversity in business structures. Evidence suggests this shift may not have affected rural patriarchy as regards the devolution of family property, see Margaret Alston, ‘Farm Women and Their Work: Why it is not Recognised?’ (1998) 34(1) *Journal of Sociology* 23; Margaret Alston, *Breaking Through the Grass Ceiling: Women, Power and Leadership in Rural Australia* (Harwood Academic, 2000); Margaret Alston, ‘Who is Down

their off-farm income, thus enabling husbands to continue farming when the enterprise may be financially unsustainable.<sup>5</sup>

Within this form of landholding, women have been required to conform to rural norms. The usual forms of inheritance and property settlements may be challenged when male farmers marry women from city backgrounds who do not accept this way of life. Stability may be threatened should a woman rebel against the self-sacrifice that is expected from her or, alternatively, she may be perceived as deviating from whatever 'the family farm' requires. In their study of farming families in Wales, Price and Evans identified an emerging discourse of women as 'gold diggers' who come in from outside agriculture, marry a farmer, and then divorce him and take half the value of the farm with them, thus endangering its survival. The same applies to Australia.<sup>6</sup>

Daughters-in-law are, thus, sometimes seen as a potential threat to the future of the farm, and one defensive strategy is for the parents to delay handing over the property to the son, in order to decrease the daughter-in-law's potential claim on the farm should the marriage fail.<sup>7</sup> According to Price and Evans, women are 'being re-imagined as a major new threat to the whole way of life' of family farming and its patriarchal ideology and power relations.<sup>8</sup>

However, feminist scholars have recently developed a more nuanced reading of this account. They have shown that women have resisted such stereotypes in some cases, and have created alternative discourses.<sup>9</sup> This crossing of gender boundaries illustrates that there is no 'homogenous femininity', as gender identities are not singular but multiple and varied.<sup>10</sup> For instance, many women help the family business by developing careers outside agriculture, enabling them to forge new identities and social connections. This employment may stem or weaken the flow of family income away from farm

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on the Farm? Social Aspects of Australian Agriculture in the 21st Century' (2004) 21(1) *Agriculture and Human Values* 37; Margaret Alston, 'You Don't Want to be a Check-out Chick all your Life: The Out Migration of Young People from Australia's Small Rural Towns' (2004) 39(3) *Australian Journal of Social Issues* 299; Lia Bryant and Barbara Pini, *Gender and Rurality* (Routledge, 2011); Barbara Pini 'Farm Women: Driving Tractors and Negotiating Gender' (2005) 13(1) *International Journal of Sociology of Agriculture and Food* 1; Barbara Pini, 'Always an Outlaw: Daughters-in-law on Australian Family Farms' 30(1) *Women's Studies International Forum* 40. See also the submissions to the Victorian Law Reform Commission and, in particular, the submission by the Victorian Farmers' Federation, Submission No 41 to Victorian Law Reform Commission, *Succession Laws*, 4 January 2013.

<sup>5</sup> See experiences elsewhere discussed in Sally Shortall, 'Power Analysis and Farm Wives: An Empirical Study of the Power Relationships Affecting Women on Irish Farms' (1992) 32(4) *Sociologia Ruralis* 431; Patricia O'Hara, *Partners in Production? Women, Farm and Family in Ireland* (Berghahn Books, 1998); Katy Bennett, 'A Time for Change? Patriarchy, the Former Coalfields and Family Farming' (2004) 44(2) *Sociologia Ruralis* 147; Haugen, Brandth and Follo, above n 1. The same applies in Australia.

<sup>6</sup> Linda Price and Nick Evans, 'From "As Good as Gold" to "Gold Diggers": Farming Women and the Survival of British Family Farming' (2006) 46(4) *Sociologia Ruralis* 280.

<sup>7</sup> John Gray, 'Family Farms on the Scottish Border: A Practical Definition by Hill Sheep Farmers' (1998) 14 *Journal of Rural Studies* 341.

<sup>8</sup> Price and Evans, above n 6, 293.

<sup>9</sup> Barbara Pini and Robin Price, 'Gender Identity and Women's Involvement in Tractor Work: A Case Study of the Australian Sugar Industry' (2005) *AIRAANZ* 449.

<sup>10</sup> Janine Liladhar, 'From the Soap Queen to the Aga-saga: Different Discursive Frameworks of Familial Femininity in Contemporary Women's Genres' (2000) 9 *Journal of Gender Studies* 5.

development towards consumption and, so, ultimately negate the otherwise positive impact of this ‘outside’ work on the farm business.<sup>11</sup>

Pini and Price, in their study on tractor work on sugar farms, have shown how women have negotiated new strategies, enabling them to reassert and maintain their femininity after crossing boundaries and driving tractors on the farm. These authors describe how women have hidden their work on the farm by only driving tractors at the back of the property, so that neighbours cannot see them. In these and other ways, such women may strongly emphasise that their domestic roles are paramount as a means to support their spouses. They may also seek strategies to foster the idea of male supremacy, by giving considerable attention to their dress, and by ignoring men who show strong masculine behaviour.<sup>12</sup> What is ironic is that these strategies offer little challenge to the gendered division of labour. In fact, such activities may reinforce and sustain it. The fact is that the representation of farming as a masculine endeavour has proved ‘highly resilient’.<sup>13</sup>

I conclude this section of the article by expanding on the idea of how farming life has traditionally been seen as patriarchal. Patriarchy in the form it exhibits in family farming is associated with ‘male’ attributes of entrepreneurialism, effort, strength and courage.<sup>14</sup> Within this view, men are constructed as the backbone of farming culture. Their activities are associated with the performance of heavy and dirty out-doors work, the handling of large animals, working with heavy machinery, and bargaining with other men in the marketplace.<sup>15</sup> In this discourse, men who navigate their family through difficult times are constructed as dealing with the rational world on behalf of others.<sup>16</sup>

## II SOME OBSERVATIONS ON THE *FAMILY LAW ACT*

The basis of altering property interests on the foundation of contributions has been described elsewhere.<sup>17</sup> Here I restrict myself to three comments. Firstly, I note the role of domestic contributions. Secondly, I comment on the role of discretion under the Act and, thirdly, I discuss the recognition that land under dispute may be ‘farm property’.

<sup>11</sup> Anne Moxnes Jervell, ‘Changing Patterns of Family Farming and Pluriactivity’ (1999) 39(1) *Sociologia Ruralis* 100.

<sup>12</sup> Pini and Price, above n 9, 455.

<sup>13</sup> Ibid.

<sup>14</sup> Some occupations have been associated with specific female attributes. Women have been associated with such activities as secretarial work and library work; Evelyn Kerslake and Janine Liladhar, ‘Angry Sentinels and the Businesslike Women: Identity and Married Status in the 1950s English Library Career Novels’ (2001) 17(2) *Library History* 83; Rosemary Pringle, *Secretaries Talk: Sexuality Power and Work* (Allen and Unwin, 1989). Women are also linked with notions of domesticity such as gentleness, sensitivity, fragility, weakness, vulnerability and dependence. See, eg, Alan Hunt, *Governing Morals: A Social History of Moral Regulation* (Cambridge, 1998) 81–87.

<sup>15</sup> Peggy Bartlett and Katherine Conger, ‘Three Visions of Masculine Success on American Farms’ (2004) 7 *Men and Masculinities* 205, 209.

<sup>16</sup> Jason Edward Black, ‘Authoritarian Fatherhood: Andrew Jackson’s Early Familial Lectures to America’s “Red Children”’ (2005) 30 *Journal of Family History* 247.

<sup>17</sup> See s 79 *Family Law Act 1975* (Cth); Anthony Dickey, *Family Law* (Law Book Company, 2014) 613. See also the provisions for spousal maintenance in s 75(2) of the *Family Law Act 1975* (Cth).

Firstly, under the ‘contributions approach’ to family law, judges under the legislation should take account of seven factors before making a property order, the most important being the perceived contribution of each partner to the wealth and welfare of the family.

Both financial and non-financial contributions are included. It is also made clear that the homemaker’s contribution is to be taken into account. The approach of assessing property on the basis of the respective contributions of the parties now sits alongside another discourse — that of recognising the parties’ perceived need of compensation in a just and equitable way. The High Court in *Stanford & Stanford*,<sup>18</sup> emphasised the view that it is extremely important to read and apply the actual words in section 79 of the Act. The majority warned against combining the requirements of section 79(2) and section 79(4) of the Act. In applying the rules under the Act, the court must first consider whether it is just and equitable to make an order, rather than considering this issue later on, as the fourth step in the process.

Secondly, the section of the *Family Law Act* dealing with alteration of property interests regards such alteration as a discretionary act and makes explicit a number of factors to be taken into account. The statute is silent on a number of issues, including the relative importance of each factor, which factors should be given a higher priority and what is to be done when there is a conflict between the factors.<sup>19</sup> Some uncertainty may arise out of this broad discretion, but the existence of discretion is justified on the bases that it gives a judge the opportunity to respond to the full range of circumstances that a case presents and it allows the judge to do justice in each case.<sup>20</sup> The court cannot use its discretion to make unjustified or arbitrary decisions, as it is required to give reasons for its determination. Despite the broad nature of the discretion, it has been possible to discern, from decisions in different periods, a ‘going rate’ in relation to similar cases.<sup>21</sup> In a similar way, Bordow and Harrison, writing in 1985, concluded that there is consistency in the decision-making process.<sup>22</sup>

Dewar suggests that while the *Family Law Act* conferred discretion on judges to distribute property, there has nevertheless been a movement from ‘discretion to rules’. He argues that this came about for a variety of reasons, one being that there was a ‘growing interest in reviving questions of normative or justificatory frameworks governing the rights and obligations of family members to each other’. In short, he says there is a ‘growing interest in a rights mode which offers a guarantee of an outcome’.<sup>23</sup> Should this be the case, we may contemplate how farming cases have become set into a pattern where male farmers have received a larger share of the farming property on divorce. I address this question later.

Thirdly, decisions from 1977 to 1985 held that land that was used for farming purposes, and that was essential to the production of an income, was in a different

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<sup>18</sup> *Stanford & Stanford* (2012) FLC 93-518.

<sup>19</sup> Patrick Parkinson, *Australian Family Law in Context: Commentary and Materials* (Lawbook, 2009) 564.

<sup>20</sup> Carl Schneider, ‘The Tension Between Rules and Discretion in Family Law’ (1993) 27(2) *Family Law Quarterly* 229, 234. See my former comments on this issue.

<sup>21</sup> Angela Lynch, Zoe Rathus and Rachael Field, ‘The Future of Family Law Property Settlement in Australia: A 50:50 Split or Community of Property Regime? Some Issues for Women’ (1999) 15 *Queensland University of Technology Journal* 77, 83.

<sup>22</sup> Sophy Bordow and Margaret Harrison, ‘Outcomes of Matrimonial Property Litigation: An Analysis of Family Law Cases’ (1985) *Australian Journal of Family Law* 73.

<sup>23</sup> John Dewar, ‘Family Law and its Discontents’ (Inaugural Professorial Lecture, Griffith University, 2000) 21 <[https://www.griffith.edu.au/\\_data/assets/pdf\\_file/0018/314604/dewar99.pdf](https://www.griffith.edu.au/_data/assets/pdf_file/0018/314604/dewar99.pdf)>.

category from land that simply provided a place for the family home.<sup>24</sup> In these cases, judges took special note of s 79(4)(d) of the Act, which required the court to take account of the earning capacity of either party. This is often referred to as the presumption or preference against a ‘crippling order’.

However, in 1985, in the case of *Lee Steere v Lee Steere*,<sup>25</sup> the Full Court indicated an important new direction when it clarified that there is no ‘farming case’ exception to the ordinary principles applicable under s 79 of the Act. Their Honours said:

The fact that the subject of property proceedings under s 79 is a farm may give rise to considerations as to the way and means by which a property division should be effected ... But there is no farming case exception to the ordinary principles applicable under s 79 of the Act ... By the same token it is wrong to approach a farm case on the basis that the wife should only receive an amount which adequately meets her needs without considering first her entitlement by way of contribution ... We must therefore reiterate that in relation to farming properties, as in relation to all other assets be they business assets or suburban land, the ordinary principles of s 79 of the Act apply.<sup>26</sup>

It is now clear that farms do not have any special status in property proceedings. Firstly, the same principles of s 79 apply, whether, as in the case of *Lee Steere*, the husband inherited the farm, or whether it was acquired by one of the parties prior to the marriage.

### III FARM CASES AND THE RECOGNITION OF THE MALE CONTRIBUTION

Farm cases from 1995 indicate how courts consider a range of factors. Courts consider factors such as the contribution of the husband bringing the farm into the marriage (the ‘initial contribution’), the future earning capacity of the wife after separation and the earning capacity of the male and his vocational need to retain the farm. At the same time, they may consider the degree to which the farm has been built up by the parties during the marriage through their respective contributions. Finally, the court may consider the overall need to ensure a ‘just and equitable’ result.<sup>27</sup>

In attempting to describe these cases, it is very difficult to show how the outcomes resulted from any one factor. This is understandable, as under the *Family Law Act* the court has to consider a range of factors. However, in the case of farm settlements, some factors seem to be of greater importance than others. The first factor I discuss is the need to give weight to the initial contribution.<sup>28</sup> This factor was present in the following three cases.

<sup>24</sup> The significant cases to note include *In the Marriage of Scott* (1977) 29 FLC 90-251; *Hayne v Hayne* (1977) FLC 76,412; *Smyth v Smyth* [1977] FLC 90-283 (1 January 1977); *Healy v Healy* [1977] FLC 76,564 (1 January 1977); *James v James* [1978] FLC77,522(90-487); *Talbot v Talbot* [1979] FLC 90-696 (1 January 1979).

<sup>25</sup> *Lee Steere v Lee Steere* [1985] FLC 91-626.

<sup>26</sup> *Ibid* 80077.

<sup>27</sup> *Family Law Act 1975* (Cth) ss 75, 79. Note my comments in *Stanford’s* case in this regard.

<sup>28</sup> The courts have indicated, with reference to a substantial initial contribution by the husband, that the proportionality of the contribution is reduced by the passing of time and the contribution of the other spouse. See, eg, *Lee Steere v Lee Steere* [1985] FLC 91-626; Anthony Dickey *Family Law* (Law Book Company, 2014) 622.

In *Parker's* case,<sup>29</sup> the husband was from a third generation farming family in northern Queensland. In 1971, the husband commenced farming with his father on a property which his grandfather acquired in 1896, and which his father now owned.

In 1981, the husband invented a packaging machine and the wife assisted in the clerical work for that operation. In 1984, she took outside work for three years. The following year, the husband's father died and the husband received an inheritance, including a part interest in another farm, which he subsequently operated. The wife also kept the books for the second farm property. When the partners separated in 1989, the judge assessed their assets as being \$2,011,655. As regards the wife's contribution, it was accepted that she had worked as a homemaker and parent, as well as on the farm, and that in the packing shed she had worked to her full capacity. The trial court judge accepted that she had far heavier duties than might normally be the case.

The court appeared to have some hesitation in accepting this evidence, and the trial court judge was reluctant to consider a maintenance element for the wife, as she would receive a large award and was capable of working. The wife also had responsibility for the three children, who at the time were between 12–18 years of age. However, the conflict between the wife's work and her parenting role was not thought to be noteworthy. The judge accepted that the husband was a 'highly driven, highly motivated man who had been industrious throughout the 20 years of marriage'. The crucial factors in the husband's favour were, firstly, the fact that he had brought assets into the marriage and, secondly, the work he had done on the farm after the separation of the parties (an eight-month period).

The trial judge awarded the wife 30 per cent of the assets in settlement of her property claims, amounting to \$507,639, and payable within 90 days. The judge further ordered that she be paid \$100 a week for each child, to cover parenting costs. On appeal to the Full Family Court awarded the wife an additional sum of only \$30,000.<sup>30</sup>

*Pike and Pike*<sup>31</sup> dealt with a couple aged in their fifties, who had been together for 22 years. The husband had brought the farm property into the marriage and the wife had brought into the marriage some assets worth \$2,500. The wife worked with her husband on the farm, doing work such as 'picking rocks and stumps', which involved working for about five to seven days a year. Other than this, she also worked with her husband at harvest time and when generally necessary. The wife carried out nearly all of the homemaking work, although the husband helped from time to time, and she was also employed as a nurse, earning about \$80,000 a year. The judge decided that of the \$4,262,281 of assets the husband was entitled to 60 per cent, while the wife received \$1,508,187.

In *Casper v Casper*, decided in 2009,<sup>32</sup> the farming property was worth \$12,100,000. The couple had been married for 16 years, with the wife bringing into the marriage assets worth \$5,000. A few years into the marriage, the husband was gifted with the parents' land, by which time it was worth \$9,700,000. During the marriage, the parties had different roles, with the wife functioning as the primary carer of the children. She had assumed a supportive role towards her husband's operation of the farm. At the time of the hearing, her salary was between \$50,000 and \$70,000 per annum. The husband argued that although he could find off-farm work in the event of losing the farm, it would not be the same as working on the land. The judge made an order enabling the husband to retain

<sup>29</sup> Appeal 59 of 1990 Suit No TV 2478, of 1989.

<sup>30</sup> In this case, the husband was the appellant, the wife had previously made an offer less than that which was finally ordered and her cross appeal was in relation to an error in the figures rather than the percentage.

<sup>31</sup> *Pike and Pike* [2009] FCWA 19.

<sup>32</sup> *Casper v Casper* [2009] FamCA 989 (15 October 2009).

the farm, dividing the assets by giving 70 per cent to the husband and 30 per cent to the wife. The judge said that it was common ground that the husband had significantly increased the value of the farm. No comments were made concerning the evaluation of either the husband's or the wife's contribution. This case involved a large asset base and the wife received a reasonable payout (\$1,610,000) and was in receipt of a reasonable income.

However, while judges give weight to a contribution of property by the husband, other factors are important as well.<sup>33</sup> The case of *Guthrie*<sup>34</sup> is instructive here, as it pays special attention to the weighting of other factors. As in the group of cases above, there was concern in *Guthrie* that any order may have the effect of forcing the farm to be sold. On this issue, the Full Court conceded, following *Lee Steere*, that farms are not 'sacrosanct' and, like any other asset, can be sold.<sup>35</sup> Fogarty J admitted that 'it would be undesirable if orders were made which had the effect of requiring the husband to sell the farming property if that could be avoided'. However, he went on to say that this is 'not a basis upon which the legitimate entitlement of the other party could be diminished'.<sup>36</sup> This case shows how the wife's financial contribution was considered and how her particular financial needs were given support.

In *Guthrie*, the trial judge found that 'the wife did some work on the property'.<sup>37</sup> As regards the parties' non-financial contributions, he noted how the 'wife as a farmer's wife necessarily did some work on the property' but that 'it was minor compared to the husband's work'.<sup>38</sup> The trial judge went on to say '[c]ertainly the wife ... helped as she could with some of the farming chores, with driving a truck occasionally, the header, assisting with various stock matters and some minor assistance at shearing. However, the vast majority of the contribution ... came from the husband'.<sup>39</sup>

As regards the husband's household contribution, the trial judge said:

[He] probably did more in that role than many a normal farmer. This is a way of life, which for the husband to get his own breakfast appears to be a major issue under the heading of homemaker and parent. Nevertheless, I find he did contribute subject to the work that he had to do out of the house in that role.<sup>40</sup>

On this basis, the trial judge had determined that the husband should receive 85 per cent of the property and the wife should receive 15 per cent. However, on appeal to the Full Court it was held that the trial judge failed to offset the husband's contribution against the domestic contribution of the wife and her financial contribution to the property. In the

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<sup>33</sup> See also the following cases. In *Cromwell v Cromwell* [2006] FamCA 1454 (28 November 2006) the husband got 80 per cent of the assets which left the wife, who had a four year old child, with \$650,000. In *Holmes and Holmes* [2012] FCWA (7 June 2012) the husband contributed the farm into the marriage valued at \$2.7 million. The wife helped on the farm in a minimal way. The husband was ordered to pay the wife \$495,000, which represented a 70:30 split in favour of the husband.

<sup>34</sup> *In the Marriage of Guthrie* [1995] FLC 92-647

<sup>35</sup> *Ibid* 82556.

<sup>36</sup> *Ibid* 82548.

<sup>37</sup> *Ibid* 82553.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid*.

appeal to the Full Court, the wife's award was increased so that the final outcome was an award of 65 per cent to the husband and 35 per cent to the wife. This, in effect, gave the wife \$66,400 out of the assets of the marriage, which were valued at \$193,848.

Two main factors governed the appeal and outcome in this case. Firstly, the wife had no skills or qualifications, was unemployed and her prospects of work were minimal. She also had three young children. Secondly, as mentioned above, she had provided a valuable contribution through her work on the farm and as a homemaker.

The case of *MVB & SDB*<sup>41</sup> provides an example of balancing other factors against the initial contribution of the farm property. The parties had been married for 32 years and had accumulated about \$2,000,000 in assets. At the start of cohabitation, the husband and wife had few assets, but 10 years into the marriage, the husband inherited a cane farm. On appeal, the Full Court held that the trial judge had not given sufficient recognition to the wife's contribution as homemaker and parent. The judges acknowledged that 'the success of the business during the marriage is clearly due mainly to the business acumen and hard work of the husband'.<sup>42</sup> The wife had no working skills, while the husband could continue to work and live on the farm. The Court noted the difficulties of comparing respective contributions but, in this case, it considered that weight must be given to the initial contribution of the husband. The final allocation was 60:40 in favour of the husband, leaving him with \$1,438,000 and leaving the wife with \$959,000.

Finally, the case of *Nickson & Nickson*<sup>43</sup> is instructive as, unlike the above cases, the court ordered an almost equal distribution of assets. Here, the couple had been married for 30 years. The case is of interest as it shows the kind of factors that judges consider in family farming property settlements. McGuire J said:

The wife ultimately seeks a sale of the remaining farming property, although her counsel's final submissions were clear that she would allow some grace for a cash settlement thereby giving the husband the option to retain the farming property. A sale of the property will, of course, bring with it costs of sale. Importantly, however, the evidence is that the husband's adult work history has been primarily as a farmer, and on this particular property. Economic factors together with his age would impact on his ability to find gainful alternative employment. If he retains the farm then he has the benefit of an ongoing income.<sup>44</sup>

After commenting that the wife had an income of less than \$20,000 per annum he continued:

I am of the view that the husband has a realistic option to retain the farming property. Whilst I am mindful of the evidence as to his current economic woes, the fact remains, as I have said consistently throughout these reasons, that farming is a season-by-season prospect ... I infer that the husband has a realistic expectation of years of good income from the property. ... I am satisfied that there should be orders whereby the wife receives 55 per cent of the property pool, as I have determined above. The husband will receive 45 per cent. ... I have found the net property of the parties inclusive of

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<sup>41</sup> *MVB & SDB* [2005] FamCA 389 (19 May 2005).

<sup>42</sup> *Ibid* [63].

<sup>43</sup> *Nickson & Nickson* [2013] FCCA 1798 (14 November 2013).

<sup>44</sup> *Ibid* [53].



superannuation to be \$502,543. The wife's entitlement of 55 per cent gives her \$276,399.<sup>45</sup>

I make a summary of these cases in my conclusion.

#### IV THE CATEGORY OF 'SPECIAL SKILL' AND NON-FARMING CASES

In some cases, a special contribution of a partner in a relationship may be regarded as far outweighing domestic activities. This is especially the situation where a spouse's business activities involve the exercise of special skills, enterprise or expertise.<sup>46</sup> Parkinson describes the role of these 'special contributions' as 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'.<sup>47</sup>

I refer to these types of contributions hereafter as 'special skills'. However, there are various terms, which refer to contributions that may be regarded as out of the ordinary. This terminology includes such expressions as 'special contributions', 'extra contributions', 'exceptional contributions', 'entrepreneurial contributions', 'special factors', 'special features', 'extraordinary skills' and so on.<sup>48</sup>

Initially it was thought that this 'doctrine' applied only to 'big money' cases. In *Stay*,<sup>49</sup> the Full Family Court took the approach that such contributions should only be considered in cases that resulted in a significant financial outcome. However, in *JEL & DDF*,<sup>50</sup> the court held that the issue of a special or extra contribution was a question of fact and the recognition of such a contribution was not dependent on the size of the asset pool. The court in this case also emphasised that the special contributions made by the homemaker should be accorded the same recognition.

I suggest the status of the 'special skill' doctrine is unclear, as it lacks an appropriate definition or scope. 'Special skills' are often seen as being relevant to big money and long marriages. Further indicative factors may be that the 'special skill' is provided by the 'financial spouse', that the skill involves business acumen and that application of the 'special skill' is connected to a large, identifiable asset.<sup>51</sup>

However, the term may be differentiated from 'special effort' and other contributions, which may attract section 79(a), such as gifts, inheritances, windfalls, personal injury payments and other lump sum payments. I consistently use the term 'special skills' for the sake of conformity. I also refer to 'special skills' as a 'doctrine'

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<sup>45</sup> Ibid 55-56.

<sup>46</sup> Dickey, above n 17.

<sup>47</sup> Patrick Parkinson, 'Quantifying the Homemaker Contribution in Family Property Law' (2003) 31 *Federal Law Review* 25.

<sup>48</sup> Ian Kennedy, "'Special Contributions' and Gender Equality — Recent Developments in Australia and the United Kingdom" (2003), Unpublished Paper.

<sup>49</sup> *In the Marriage of Stay* [1997] F.L.C. 84,119 (92-751).

<sup>50</sup> *JEL v DDF* [2001] FLC 93-075.

<sup>51</sup> Alexandra Moles and Emily Wood, *Contributions: The Corporate High Flyer and the Stay at Home Spouse* (February 2009) Hopgood Lawyers  
<[http://www.hopgoodganim.com.au/icms\\_docs/135741\\_HG\\_Paper\\_Contributions\\_-\\_Corporate\\_High\\_Flyer\\_and\\_Stay\\_at\\_Home\\_Spouse\\_-\\_Feb\\_2009.pdf](http://www.hopgoodganim.com.au/icms_docs/135741_HG_Paper_Contributions_-_Corporate_High_Flyer_and_Stay_at_Home_Spouse_-_Feb_2009.pdf)>.

fully recognising that this term may not be appropriate, since some commentators suggest it arguably lacks authority. I acknowledge that, given the trend towards equality of contributions, the significance of this doctrine may be fading.

The general thrust of this article relates to family farms and how the respective shares that partners receive in property settlements are calculated. In this context, it is appropriate to consider the case of 'special skills'. This is because it is necessary to consider whether male or female farmers may be able to argue that their respective contributions should be regarded as an instance of 'special skill'. It is admitted that the calculations made in property proceedings, which determine the respective shares that husbands and wives receive, may not reflect what different people consider to be fair. Nevertheless, percentage calculations do provide some help.

The role of the courts in assessing contributions has been generally seen to commence with *Mallet*.<sup>52</sup> *Mallet* is renowned for rejecting the idea that the starting point in cases of property division should be an assumption of equality of contribution or the notion that 'equality is equity'. The High Court indicated that such an approach placed a fetter on the jurisdiction of the court, which was not authorised by the Act.<sup>53</sup> While the court recognised that equality is a possible outcome in an appropriate case, it was against such a possibility where the special ability of a particular party had enabled the development of an extensive empire.<sup>54</sup>

It is clear that since *Mallet*, the High Court has accepted that some types of contributions may have a quality that allows them to attract extra weight. These special contributions do not form a special class of contributions outside the statutory framework. Rather, this notion of special or extra contribution simply recognises that some contributions, because of their weight, must be taken into account.<sup>55</sup> Several cases are usually discussed as illustrative of 'special skills'.

In the case of *Whiteley*,<sup>56</sup> which related to Brett Whitely, the famous painter, his wife of 30 years claimed that she had made a significant contribution to her husband's career. She claimed that she had provided Brett with inspiration, criticism and advice during the course of his career, as well as carrying out the roles of homemaker and parent. The case provides a useful example of where the business income was earned through a distinctive talent. When the relationship ended, the assets were worth \$11,000,000, and the wife received 32.5 per cent of this.

In assessing the respective contributions, Rowlands J said:

It is clear that the husband, because of his 'special skill' as an artist has 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 ... it has been the husband's industry and talent which has been substantially more significant of the two [contributions] ... I think it is proper to assess the contributions 70:30 in favour of the husband.<sup>57</sup>

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<sup>52</sup> *In the Marriage of Mallet* (1984) 156 CLR 605.

<sup>53</sup> *Ibid* 625, 636, 640, 646.

<sup>54</sup> Paul Doolan, 'Confusion Reigns Supreme: Part 2 — The Family Court and Big Money Cases' (2006) 12 *Current Family Law* 16.

<sup>55</sup> *Ibid*.

<sup>56</sup> *In the Marriage of Whiteley* [1992] FLC 92-304.

<sup>57</sup> *Ibid* 79300

In *Ferraro*,<sup>58</sup> the husband and wife had few assets when they married. When they separated 27 years later, they had an accumulated wealth of more than \$12,000,000. During the marriage, the wife was predominantly engaged with 'home duties', which allowed the husband to run a very successful business. At the trial, the judge commented that the wife's contributions were of limited value. An unfortunate comparison was made between an 'ordinary gardener who tills the weeds (the wife) versus the creator of the Sissinghurst Gardens' (the husband).

In dividing up the assets the trial judge awarded the husband with seventy per cent of the assets. However, the Full Court awarded the husband 62.5 per cent of the assets and found that:

as the husband is concerned there is no doubt that, especially in the last decade of the marriage, by his special skills and endeavour he greatly increased the assets of the parties to the level at which they were at the time of the trial. In accordance with authority, those special skills are entitled to recognition as an extra or 'special contribution'.<sup>59</sup>

The judges recognised that the husband was seen to have exhibited remarkable financial acumen, which enabled him to succeed in his chosen occupation, while the wife's contribution was regarded as no greater than it had been before the husband started his business.<sup>60</sup>

In *the Marriage of Figgins*,<sup>61</sup> the husband received an inheritance of \$28,000,000 following the premature death of his father and stepmother after just two weeks of marriage. At the trial, the net worth of the assets was \$22,500,000. The two judges awarded the wife \$2,500,000. The inheritance was seen as a windfall and did not amount to a contribution characterised by 'special skill'.

The judges rejected the concept that there is something special about the role of the male breadwinner, that means that he should achieve a preferred position in relation to his female partner. Marriage, they concluded, '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'.<sup>62</sup>

As regards the notion of contributions, the Full Court, consisting of Nicholson CJ and Buckley J said:

We are troubled that in the absence of specific legislative direction, courts consider they should make subjective assessments of whether the quality of a party's contributions was 'outstanding'. It is almost impossible to determine questions such as: Was he a good businessman/artist/surgeon or just lucky? Was she a good cook/housekeeper/entertainer or just an attractive personality? We think it invidious for a judge to in effect give 'marks' to a wife or husband during a marriage. We think that this doctrine of 'special contribution' should, in an appropriate case, be

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<sup>58</sup> *In the Marriage of Ferraro* [1993] FLC 79,543 (92-335).

<sup>59</sup> Ibid 79582.

<sup>60</sup> Ibid 79564.

<sup>61</sup> *In the Marriage of Figgins* [2002] FLC 93-122.

<sup>62</sup> Ibid 89302..

reconsidered. We think that the decision of the House of Lords in *White v White* gives force to these concerns.<sup>63</sup>

In *Kane & Kane*,<sup>64</sup> a couple separated after a 28-year marriage, with a pool of assets valued at \$4,200,000. Of this amount, \$3,400,000 was in a superannuation fund. The trial judge awarded two thirds of the superannuation fund to the husband and one third to the wife. This award was made on the basis that the husband had shown exceptional skill in investing in financial matters as regards the one-off purchase of shares for the superannuation fund. The Full Family Court overturned the decision on the basis that the lower court had given unacceptable weight to the husband's skill in investing money in the fund. The judges on appeal, in referring the case back to the lower court, said that the lower court judge had placed too much weight on the contributions of the husband and his efforts in the acquisition of the property.

In *Hoffman & Hoffman*,<sup>65</sup> the parties were together for 36 years. The property involved consisted of superannuation and other assets worth about \$3,000,000. At first instance, before Brewster FM, it was decided that the parties could retain their own property, but that the husband was to pay the wife \$3,000,000. In effect, this split the family wealth 50:50. The husband appealed, arguing for a 70:30 split, as he contended that Brewster FM had failed to sufficiently recognise the husband's 'special skill'. The appeal was dismissed and the court held that the magistrate was not required to take into account special contributions. The Full Court held that:

we consider that the true position is, with respect, put correctly and *succinctly* by O'Ryan J in *D & D* [2005] FamCA 1462 at [271]: '*the notion of special contribution has all been a terrible mistake ... what I have to do is identify and assess the contributions made by each of the parties without any presumption of entitlement (emphasis in original). The task is to make findings as to the nature, form, characteristics and duration of each and all of the contributions made by each of the parties referenced to s 79(4), without adjectival qualification. Thereafter the court must undertake the exquisitely difficult task of assessing how those respective contributions, often of differing types (a task which his Honour referred to below as a comparison of apples and carrots) find expression in qualitative assessments.*'<sup>66</sup>

In *Fields & Smith*,<sup>67</sup> a wealthy Gold Coast property developer separated from his wife after 29 years of marriage. During the marriage, he and his wife accumulated assets worth up to \$29,000,000. In the Family Court, at first instance,<sup>68</sup> the husband was awarded 60 per cent of the couple's assets and the wife received 40 per cent. Justice Murphy took the approach that while both parties had a 'practical union of both lives and property',<sup>69</sup> the husband had made a greater contribution to the assets, as this was a reflection of the husband's ingenuity and stewardship' in running the family business. Justice Murphy concluded that the husband had made a significant contribution which was 'due in no small part to the business acumen and skill exhibited by the husband'.<sup>70</sup> He went on to

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<sup>63</sup> Ibid 89296.

<sup>64</sup> *Kane & Kane* [2013] FLC 93-569

<sup>65</sup> *Hoffman & Hoffman* [2012] FMCAfam 1061 (17 December 2012) and on appeal *Hoffman & Hoffman* [2014] FLC 93-591.

<sup>66</sup> Ibid 79,262.

<sup>67</sup> *Smith & Fields* [2012] FamCA 510 (6 July 2012) and on appeal *Fields & Smith* [2015] FLC 93-638.

<sup>68</sup> *Smith & Fields* [2012] FamCA 510 (6 July 2012).

<sup>69</sup> Ibid [45].

<sup>70</sup> Ibid [67]

say that ‘I consider the contribution of the husband’s business acumen, skill and talents to have been significantly greater than that of the wife’.<sup>71</sup>

When the wife appealed, one of the grounds was that the judge had erred in finding that the husband should be given special recognition for his special skills. She argued that the trial judge had devalued her long-term roles as homemaker and parent, and that the trial judge had placed undue emphasis on the husband’s stewardship of the family business.

In the Full Family Court,<sup>72</sup> it was decided that the couple should share their assets equally, despite the husband’s claim that he should receive 70 per cent because of his special skill.

I consider three aspects of this case.

Firstly, in reaching his decision in the Family Court, the judge referred to previous awards where courts had generously rewarded ‘special skills’. In this regard, Justice Murphy had referred to a table of cases where typical awards were made. In his view, it was appropriate ‘to take into account earlier decisions so to inform generally the parameters of the discretion’.<sup>73</sup>

One of the grounds of appeal advanced by the wife was that the trial judge’s inclusion of a table of ‘Comparative Cases’ amounted to an impermissible fetter to his discretion. In the Full Family Court, it was accepted that the trial judge’s apparent reliance on this table had led him into error.<sup>74</sup> This was the case as the court said:

We cannot be certain that notwithstanding the caveats his Honour referred to his Honour was not led into error by relying on the table. First and foremost, the table is set out in his judgment in its entirety. Secondly, his Honour pointed out that self-evidently the table indicates that in each of the cases the proportions to be received by the wives was between 27.5 per cent and 40 per cent. In this case, it is clear from his Honour’s earlier comments that the wife’s contribution in this marriage was a significant one and that when apparently assessing her against the table it would seem reasonable that she should receive the upper limit of the awards if the table were to be followed. In fact the wife did receive 40 per cent, or the upper limit of the table.

The fetter on the discretion lies, in our view, in the apparent reliance on the table which then has the appearance of acting as a ceiling which prevents the wife from effectively being considered as entitled to any more than 40 per cent, or suggests a result in a particular range should follow.<sup>75</sup>

This approach reflects a strong strand of judicial thought (which I call the ‘discretion approach’) that ‘eschews reference to and analysis of comparable cases’.<sup>76</sup> It has been

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<sup>71</sup> Ibid [67]

<sup>72</sup> Ibid. Before Chief Justice Bryant and Justice Ainslie-Wallace. Justice May delivered separate reasons for her judgment agreeing with the outcome of the appeal.

<sup>73</sup> Ibid [88].

<sup>74</sup> (2015) 93-638,80143.

<sup>75</sup> Ibid.

<sup>76</sup> Justice Paul Brereton, ‘Breaking Precedent: The Relevance of Previously Decided Cases in Determining the Entitlements of Parties in Property Proceedings’ (Paper presented to the Queensland Law Society Practitioners’ Association, 18 July 2015) 2.

argued that a wide discretion given to the court by Parliament ‘maximized the possibility of doing justice in every case’.<sup>77</sup>

The other view, as regards the role of discretion, finds comfort in identifying a range of comparable cases.<sup>78</sup> This view is attractive as it provides consistency of outcome and makes it easier for those giving professional advice in this area. I call this the ‘rules approach’. I comment later on the significance of the two approaches.

Secondly, the Full Court agreed with Justice Murphy that there is no particular type of special category called ‘special skills’. In this regard, Justice Murphy said:

specifically, I reject the notion that any such distinction should be drawn because this might be described as a ‘big money case’ or because, per se, the husband’s predominant contributions have been made to a very successful and valuable business as distinct from the wife’s predominant contributions which were and are made indirectly and, in particular, contributions made to the welfare of the family. In that respect, I also reject the notion that one ‘sphere’ or ‘role’ should be seen as, of itself, more important, or more inherently ‘valuable’, than the other.

I do so for a number of reasons. First, the terms of s 79 suggest no such thing. Secondly, doing so risks giving insufficient or ‘token’ weight to the ‘sphere’ comprising contributions to the welfare of the family or other indirect contributions and doing so is contrary to authority.<sup>79</sup>

In the Full Court, Chief Justice Bryant and Justice Ainslie, in endorsing this approach, said that ‘Full Court decisions have supported the view of *Kane & Kane*<sup>80</sup> and *Hoffman & Hoffman*<sup>81</sup> and that the jurisprudence can be said to be fairly settled’. In this context, the court quoted *Hoffman & Hoffman*, in which it was said that:

In each case, we consider that the point being made is that there is *no* principle or guideline (or indeed anything else emerging from s 79), that renders the direct contribution of income or capital more important — or ‘special’ — when compared against indirect contributions and, in particular, contributions to the home or the welfare of the family.<sup>82</sup>

Thirdly, as regards the respective contributions of the parties in *Fields & Smith*, the court rejected the husband’s arguments concerning his ‘special contribution’. This was because the husband was able to exercise his skill in the business since he had been freed from other responsibilities. In other words, the wife’s contribution as homemaker allowed the husband to make his contributions to his business. In particular, as regards the contributions, the majority of judges said:

<sup>77</sup> *Norbis v Norbis* (1986) 161 CLR 513, 519 (Mason and Deane JJ). Note the comment in *Cumpton v Cumpton* (2007) 38 Fam LR 377, 409 by Justice Moore, ‘that no two cases are alike so there is no real assistance to be gained from reviewing the assessments in other cases’.

<sup>78</sup> There are strong arguments made by writers within jurisprudence and family law generally regarding the role of discretion. See, eg, Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford University, 2005) 79–91. MacCormick has argued that for any decision to be just, it must be universalisable, as a decision cannot be justified without this factor since law has to meet requirements of consistency and coherence that bring about the best consequences possible such that decisions are predictable and provide certainty.

<sup>79</sup> *Smith & Fields* [77]–[78].

<sup>80</sup> *Kane & Kane* [2013] F.L.C93-569.

<sup>81</sup> *Hoffman & Hoffman* [2014] FLC 93-591.

<sup>82</sup> *Ibid* 79,260.

The wife's contributions in this case, however, were not limited to homemaker and parent or to the welfare of the family more generally. She had involvement in the business itself and the contributions she made prior to the establishment of the business in assisting the husband in improving and selling their homes from which they moved regularly contributed to the capital to start the business. Once the business was operating, the wife was a director and there was no suggestion that that role was not assiduously carried out by her. ... In this case, these are all significant contributions which can be seen to be the 'practical union' which Deane J refers to in *Mallet* ... In our view, to place greater weight on the contributions made by the husband in his sphere does not do justice to the wife's contributions in the various capacities that we have outlined. Giving appropriate weight to the contributions of both parties and where, as the trial judge also found, the nature and form of their partnership was that of a 'practical union of lives and property', that leads us to conclude that the contributions made by the parties should be treated as equal.<sup>83</sup>

It may be argued that this case has ended the idea of special contributions and that it confirms the trend towards equal contributions. I deal with these matters in the next section.

#### V CRITICISMS OF 'SPECIAL SKILLS': ARE THEY DEAD?

Commentators have criticised 'special skills' in several ways.<sup>84</sup> Firstly, it has been argued that the essential starting point of the notion of 'special contributions', as commenced under *Mallet*, is outdated. The oft quoted maxim that homemaking contributions are to be taken into account 'not in a token way, but in a substantial way'<sup>85</sup> is seen by Brown as 'patronizing' and should be seen as a 'motherhood statement'.<sup>86</sup> Along these lines, Brewster FM in *Hoffman* noted that:

these judges were born between 1917 and 1933. The *zeitgeist* of the era when they grew up, and the *zeitgeist* in 1984 when *Mallet* was decided, was vastly different to the *zeitgeist* today. Under the approach taken in *Mallet* the dice was loaded against a wife who performed a role as homemaker and parent. One might ask how she could compete with a high flying businessman. Clean the floors such that one could eat off them? Iron her husband's shirts to within an inch of their lives? Make the bathroom tiles sparkle such that one has to put on sunglasses to take a shower?<sup>87</sup>

<sup>83</sup> [2015] FLC 93-638, 80156.

<sup>84</sup> See, eg, Lisa Young, 'Sissinghurst, Sackville-West and Special Skill' (1997) 11 *Australian Journal of Family Law* 268; Moles and Wood, above n 51; Mark Brown, 'Blame it on Kane' (2014) 24(1) *Australian Family Lawyer* 26; Alison Ross and Susan Moore, 'Figgins — A New Direction or Just Rhetoric?' (2003) 16(3) *Australian Family Lawyer* 35.

<sup>85</sup> *In the Marriage of Mallet* (1984) 156 CLR 605, 609.

<sup>86</sup> Brown, above n 84.

<sup>87</sup> *Hoffman & Hoffman* [2012] FMCAfam 1061 (17December 2012) [46].

Secondly, the recognition of ‘special skills’ has been seen to reflect gender bias.<sup>88</sup> In a well-cited article, Lisa Young writes that ‘the “special skills” exception has little to do with contributions but more to do with chance. Only when the so-called “special skill” results in significant assets of a commercial value is the contribution recognised and the issue has been raised’.<sup>89</sup> This approach, she argues, downgrades non-commercial assets and especially women’s contributions to the welfare of the family. Other commentators, such as Graycar in 1989, said that ‘the language used in these cases indicates that work in the home is not the same as “real work”, such as work that generates income, leading to the accumulation of substantial assets’.<sup>90</sup> These comments were made about a range of cases and not just in reference to ‘special skills’.

Thirdly, the case of *Fields & Smith*<sup>91</sup> indicates disquiet as regards higher evaluations of a man’s ‘special contribution’, since that case, as discussed, did recognise work in both spheres as being equal. I expand on this point later.

Despite the above criticisms, I suggest the most authoritative approach remains that it is valid for courts to consider ‘special skills’.<sup>92</sup> It is arguable that giving extra weight to ‘special skills’ is consistent with the ‘inexorable logic’ of s 79(4)(a)–(c), to the effect that credit is to be accorded for financial success founded on talent. As a consequence of the wording of the section, gender inequality is unavoidable. If there is a facility to assess special contributions, it is a task that the court cannot avoid.

As Guest writes:

The doctrine of special contribution offers a justifiable recognition of a special contribution derived from exceptional skills and effort ... 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 in my view not sexist, not gender discriminatory, nor is it gender biased.<sup>93</sup>

<sup>88</sup> See, eg, Young, above n 84; Brown, above n 84; Regina Graycar, ‘Gendered Assumptions in Family Law Decision Making’ (1994) 22(2) *Federal Law Review* 278 — Graycar comments on the devaluation of women’s contributions more generally; Regina Graycar, ‘Legal Categories and Women’s Work: Explorations for a Cross-Doctrinal Feminist Jurisprudence’ (1994) 7 *Canadian Journal of Women and the Law* 34; Regina Graycar, ‘Matrimonial Property Law Reforms and Equality for Women: Discourses in Discord’ (1995) 25 *Victorian University Law Review* 9; Regina Graycar, *Public and Private Feminist Legal Debates* (Oxford, 1996).

<sup>89</sup> See, Young, above n 84 at p. 268.

<sup>90</sup> Graycar, ‘Matrimonial Property Law Reforms and Equality for Women: Discourses in Discord’, above n 88.

<sup>91</sup> [2015] FLC 93-638

<sup>92</sup> I suggest that it is so, despite the dicta quoted above in *In the Marriage of Figgins* [2002] FLC 93-122, as that decision was based on the factor of an unexpected inheritance. See also Paul Guest, ‘An Australian Perspective on the Evolution of the Law in Relation to the Assessment of Special Contributions in “Big Money Cases”: Never Mind the Law, Feel the Politics’ (2005) 19(2) *International Journal of Law, Policy and the Family* 148 — Guest argues that what Nicholson CJ and Buckley J said ‘was mere *obiter* which should, given the circumstances, hold no more significance than that’; See also Paul Guest, ‘The End of Equality: Discussion in Relation to the Assessment of Special Contributions in “Big Money” Cases: An Australian Perspective’ (2004) *Oxford Centre for Family Law and Policy* 41.

<sup>93</sup> Guest, above n 92.



## VI FARMING CASES AND 'SPECIAL SKILLS'?

Does the doctrine of 'special skills' apply in farming settlements? The case of *Parker*,<sup>94</sup> above, may appear to be such a case, as the husband was seen as a 'highly driven, highly motivated and industrious' farmer for a period of 20 years.

One of the problems with the 'doctrine' is that in many cases, where there is an allocation of property on account of 'special skills', there is no reference to the line of cases that led back to *Mallet*. Thus, two lines of cases often run side by side — one that evokes the idea of 'special skills' and refers back to *Mallet* and the other which assess the respective contributions of the parties without making any reference to the learning in this area. The two lines of cases are like ships in the night without contact.

The issue in these farming cases is which 'skill' should be given greater recognition? On the one hand, the wife may have shown 'special skill' in the home, while the husband may have shown 'special skill' on the farm.

One case has evaluated the role of the 'special skills' doctrine in family farm divorce. This is the case of *Cuneo & Cuneo* from 2006.<sup>95</sup> In this instance, a couple commenced farming on land which, at the time of the hearing, was worth \$4,000,000. While accepting that the husband was a 'hardworking, diligent and at times successful farmer', the judge decided that he had made no special contribution. While there was no evidence to establish any deficiency in the husband's 'stewardship' over the years, the judge concluded that he could not 'elevate' the husband's contribution 'to greater status than the wife's contributions as a homemaker and parent'. He argued that he could not make such a subjective and gendered assessment.<sup>96</sup>

In a criticism of the doctrine of special contributions, Coleman J referred to the *Figgins* case, in which the judges said that they were 'troubled that ... courts consider they should make subjective assessments of whether the quality of a party's contributions was outstanding'.<sup>97</sup> While Coleman J admitted that there were perhaps other entrepreneurs or artists who could be considered to have made special contributions, he felt that the contributions of the husband in this case did not attract that status. Accordingly, the special contributions or 'skills status' could not be made out in such circumstances, and the judge awarded 52 per cent of the property to the husband and 48 per cent to the wife.

In contrast to *Cuneo & Cuneo* is the case of *Cumpton v Cumpton*,<sup>98</sup> where the husband and the wife had been together for 18 years. Both parties had brought assets of various kinds into the marriage and, otherwise, both had contributed in their respective spheres.

Apart from running the farm, the husband had developed a sustainable agricultural project, based on the invention of a particular technology. In the course of the relationship he sold it for \$5,000,000 for which he received \$3,600,000 after tax. The husband claimed that his special contribution was the introduction, refinement and marketing of this technology. The judge recognised that there could be no question that it was his 'skill and

<sup>94</sup> Appeal 59 of 1990 Suit No TV 2478 of 1989.

<sup>95</sup> *Cuneo & Cuneo* [2006] FamCA 158 (17 March 2006). I have mentioned *MVB & SDB* [2005] FamCA 389 (19 May 2005), where the 'acumen and hard work of the husband' was stressed. However, as the *Mallet* approach was not developed here, I have not argued that this was a case of 'special skill'.

<sup>96</sup> *Ibid* [235].

<sup>97</sup> *Ibid* [232].

<sup>98</sup> *Cumpton v Cumpton* (2007) 38 Fam LR 377.

acumen, innate and special to him, that produced the product and that is deserving of recognition and substantial weighting in his favour'.<sup>99</sup> The judge said:

On the facts of this case there could be no question that the arrival of over \$3.584 million net ... was overwhelmingly referable to the husband's introduction to the marriage of the fundamental framework of the intellectual property sold, to his refinement of it and to his efforts to market and sell it, all of which in turn is referable to his innate and special skills in inventing it. His contributions must be *weighted* accordingly in recognition of his special skills and his special contribution. Of course, that weight must take into account the indirect contribution by the wife in her support but as the time spent on bringing it to the point of sale was not significant in the scheme of things, that brings about a relatively minor counterbalance.<sup>100</sup>

The judge decided that the husband should receive 87.5 per cent of the wealth and that the wife should receive 12.5 per cent. He concluded that 'it is recognised this is a large disparity, with the husband's entitlement being seven times that of the wife's, but it is one I regard as warranted on the facts of this particular case'.<sup>101</sup>

## VII CONCLUSION

I have indicated the nature of social relationships on farms and have shown that the rural perception is that men perform physical work and women undertake domestic work. Under this understanding, women's labour is usually regarded as secondary or is labelled as 'helping out'.<sup>102</sup> I have also discussed how social theorists like Connell have argued that patriarchy at higher levels in society (state parliaments, judiciary) interlocks and reflects local arrangements (families, local councils, schools).

In her study on routine debtors cases Maureen Cain found that, contrary to the rhetoric espoused by judges, the role of the court was not to settle disputes or to enforce the law, but was to constantly restate the law of property in cases brought against recalcitrant debtors. She found that in judging these cases, the courts were led continually 'to affirm the legal constitution of those relationships which were presented to them by a particular set of users'.<sup>103</sup> In other words, the courts acted in a functionalist fashion in that they performed a socially integrating role by reinforcing social values and ideologies.

<sup>99</sup> Ibid [109].

<sup>100</sup> Ibid [116].

<sup>101</sup> Ibid [118].

<sup>102</sup> Barbara Pini, 'We Could Have Had the Old Girl Out in the Paddock Years Ago: Widowed Women, Farming and Agricultural Leadership' (2003) 17(1) *Work, Employment and Society* 171. Other seminal work on this topic includes Margaret Alston, 'Farm Women and Their Work: Why it is not Recognised?' (1998) 34(1) *Journal of Sociology* 23; Margaret Alston, *Breaking Through the Grass Ceiling: Women, Power and Leadership in Rural Australia* (Harwood Academic, 2000); Margaret Alston, Margaret Alston, 'Who is Down on the Farm? Social Aspects of Australian Agriculture in the 21st Century' (2004) 21(1) *Agriculture and Human Values* 37; Margaret Alston, 'You Don't Want to be a Check-out Chick all your Life: The Out Migration of Young People from Australia's Small Rural Towns' (2004) 39(3) *Australian Journal of Social Issues* 299; Shortall, above n 5; Sarah Whatmore, *Farming Women: Gender, Work and Family Enterprise* (MacMillan, 1991).

<sup>103</sup> Maureen Cain, *Disputes and the Law* (Kiako, 1983) 119.

I argued, in a similar way, that cases up to 1985 endorsed rural patriarchy through the outcome that the male farmer received a viable share of the farm,<sup>104</sup> which, in effect, supported the ‘social facts’ of rural life.<sup>105</sup> The views in these cases, as regards the male retention of the farm, coincide with community support for nuclear families based on rural households, the endorsement that farming sons should inherit rural property,<sup>106</sup> and that the man should receive a viable amount on divorce so that he can continue farming. These norms exist alongside a conceptualisation of women as farmer/helper.

Feminist writers have well observed how women’s labour has been discounted in divorce cases in general and how the stellar efforts of men have been given a higher weighting.<sup>107</sup> However, as these comments were made some time ago, are they appropriate in light of recent farm cases?

A few of these cases, discussed above, show how judges recognised the intermingling of work roles on family farms. For instance, in *Guthrie and Fields & Smith*, the judges recognised that both members of the couple worked in ‘both spheres’, rather than in rigid separate spheres where each contributed only in their ‘own realm’. Indeed, there was a certain degree of flexibility in both roles. However, while this may be the case, many judges continue to construct separate spheres of activities for respective partners and take the respective value of this work into account in reaching their decision. While this approach is authoritative, given the terms of the Act and the need for judges to work out what the contributions were, it is nonetheless artificial as it does not sit well with the belief of many participants who consider the farm to be a joint operation.

I have suggested, in general, that ‘farming males’ have received generous settlements. This word ‘generous’ must be measured against the amount of property available in an estate, since in some cases the amount of assets for distribution is minimal, given the needs of the parties. I use the expression ‘generous’, recognising that opinion may be divided in two ways concerning what is reasonable and fair. Firstly, some may

<sup>104</sup> See cases cited n. 24. Note *Magas v Magas* [1980] FLC 90-885 (1 January 1980) was the exception here, as the approach in this case predated the approach of *Lee Steere*.

<sup>105</sup> Some scholars have shown that judges refer to social facts inherent within a case and these findings do play a role in their reasoning. These include social and economic factors, which provide a context for judicial reasons. See Kylie Burns’ study of negligence cases in Kylie Burns, ‘The Australian High Court and Social Facts: A Content Analysis Study’ (2012) 40 *Federal Law Review* 317. For instance, Kirby J in *Permanent Trustee v Frazer* (1995) 36 NSWLR 24, using English evidence, utilises the work of Janet Finch and Jennifer Mason, ‘Obligations of Kinship in Contemporary Britain: Is There Normative Agreement?’ (1991) 42(3) *British Journal of Sociology* 345, who argue that there was no consensus amongst the English about the responsibilities that people have towards their relatives.

<sup>106</sup> Research indicates that most parents generally prefer a male successor. A recent survey indicated that parents prefer a son to inherit the property. See, eg, Elaine Barclay, Ros Foskey and Ian Reeve, ‘Farm Succession and Inheritance: Comparing Australian and International Research’ (2005) *RIRDC Report Canberra*.

<sup>107</sup> Hilary Charlesworth, ‘Domestic Contributions to Matrimonial Property’ (1989) 3(2) *Australian Journal of Family Law* 147; Young, above n 84 ; Regina Graycar, ‘Gendered Assumptions in Family Law Decision Making’, above n 89; Regina Graycar, ‘Legal Categories and Women’s Work: Explorations for a Cross-Doctrinal Feminist Jurisprudence’ (1994) 7 *Canadian Journal of Women and the Law* 34; Regina Graycar, ‘Matrimonial Property Law Reforms and Equality for Women: Discourses in Discord’ (1995) 25 *Victorian University Law Review* 9; Regina Graycar, *Public and Private Feminist Legal Debates* (Oxford, 1996).

consider that a fair situation results from the judge bringing the farm into the asset pool and not making a ‘crippling order’ since, in such an instance, a man may receive a distribution of the property that enables him to continue on the farm. Secondly, against this view are those who think that marriage is for ‘richer and poorer’ and that all assets should be shared equally. As regards this latter view, the *Family Law Act* is not concerned with equality of outcome between the parties, but requires a court to consider, amongst other factors, the merit of the contributions.

The theme of this article is that in the majority of these cases judges have been more sympathetic to farming males. The tension inherent in a post-divorce property distribution, between male continuity and wife support, has fairly consistently been resolved in men’s favour. In this light, we may see the validity of Dewar’s comment that the *Family Law Act* has been slanted from ‘discretion to rules’. In this way, there has indeed been a ‘going rate’ that generally leads to men getting a better result than their wives. It must be conceded that given my comments above on the two types of discretion, should *Fields & Smith* be followed by the High Court, the trend may be changed from ‘rules to discretion’.

I now summarise the different groups of cases that I have analysed. The overarching principle of these cases prior to *Lee Steere* was that it was necessary to protect the farmer’s ability to earn income from the farm and to preserve the farm from a sale.

Given the strong *dicta* in *Lee Steere*, one might have thought that future husbands in subsequent cases would not be in a position to receive favourable treatment. However, the next group of cases (*Parker, Pike* and *Casper*) showed how judges have continued to give importance to the male farmer’s initial contribution, so that, in effect, the farm may be kept intact for the male farmer. To support this approach, women’s homemaker contributions were devalued and their post-separation needs limited.

I then examined another group of cases (*Guthrie, MVB & SDB* and *Nickson*). These cases showed, quite starkly, how credit for the male contribution to the farm was weighed up against other factors. These other factors included women’s contributions to the home and to financial assets, as well as the future support of the wife as a mother for the children.

Thirdly, I examined the doctrine of ‘special skill’ in relation to the allocation of property on family farms. It is difficult to see how this ‘doctrine’ might apply to the division of assets on average farms. By an ‘average farm’ I mean one where the farm was brought into the relationship by the husband and where the parties worked side by side, with no separate or distinct business that one party ran outside of the farm.

I suggested that in ‘average farms’ a court would not differentiate between work on the farm and domestic work by deciding that the man’s farm work was a ‘special skill’. I considered this to be the case since, in those cases where ‘special skills’ have been seen to exist, the courts have posited a personal attribute that has been considered pertinent to the accumulation of a large, identifiable asset or assets.<sup>108</sup>

In this context, *Cuneo* may be contrasted with *Cumpton*. In *Cuneo*, the husband and wife were working on what I call an ‘average farm’ and it was held that there was no ‘special skill’ exhibited by the husband. However, in *Cumpton*, there were off-farm assets in addition to the farm, where the husband had worked independently on those assets with

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<sup>108</sup> See *JEL v DDF* (2001) FLC93-075. In this case, the husband was seen to have a ‘special skill’ as regards his experience and expertise in the mining industry and it was considered that this should be recognised as a contribution to assets outside of the general asset pool and that he should be given credit for this contribution. See also *In the Marriage of Whiteley* [1992] FLC 92-304 (1 January 1992), but compare *Kane & Kane* [2013] 93-569 and *Hoffman & Hoffman* [2014] 93-591, where it was decided that the case of ‘special skill’ was not made out. Of course, these were not farm cases.

a different set of skills. In that case, the husband's special skills were rewarded. However, I conclude that on 'average farms' courts would not find a 'special skill'. I suggest this may especially be the case should the High Court endorse *Fields & Smith* and *Hoffman* as regards the rejection of 'special skills'.

