

FAMILY PROPERTY DIVISION AND THE PRINCIPLE OF JUDICIAL RESTRAINT

PATRICK PARKINSON AM*

The Family Law Act 1975 (Cth) provides that judges must not alter property rights on the breakdown of the relationship unless satisfied that it is just and equitable to do so. This is the principle of judicial restraint. In the past, and prior to the 2012 decision of the High Court in Stanford v Stanford, this principle was given almost no effect. The High Court sought to correct this approach, insisting that the family courts should not begin from an assumption that a couple's property rights are or should be different from the state of the legal and equitable title. It also reaffirmed that there is no community of property in Australia. This article considers the significance of the principle of judicial restraint: first, in cases where the property is already jointly owned and, secondly, in cases where the couple have chosen to keep their finances separate.

I INTRODUCTION

Why should courts, exercising jurisdiction under the *Family Law Act 1975* (Cth) ('the Act'), alter property rights when marriages or de facto relationships break down? Many reasons might be given to justify the alteration of property rights, including that the state of the legal title does not reflect the various contributions of the parties or that one of them, most often the mother, needs a greater share of the marital assets in order to provide a home for dependent children and to compensate for career disadvantage due to caring responsibilities.¹

The fact that in many cases there will be a justification for altering property rights does not mean in all cases this is appropriate. After all, many couples have

* Professor of Law, University of Sydney; Special Counsel, Watts McCray Lawyers, Sydney.

1 See generally Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) ch 10; Patrick Parkinson, *Australian Family Law in Context: Commentary and Materials* (Thomson Reuters, 6th ed, 2015) chs 12, 17. While most of the research on the effects of relationship breakdown has been on marital relationships, research indicates that the economic consequences of the breakdown of de facto relationships are very similar to those of marriage: see generally Sarah Avellar and Pamela J Smock, 'The Economic Consequences of the Dissolution of Cohabiting Unions' (2005) 67 *Journal of Marriage and Family* 315.

joint legal title to the home, bank accounts and other assets, meaning that the major assets, other than superannuation, are already owned equally. Yet prior to the High Court's decision in *Stanford v Stanford*,² Australian family property law rested upon an unspoken assumption that the state of legal title was almost entirely irrelevant to the division of property on separation, and that the courts should simply look at the 'pool' of assets and divide it in accordance with specified percentages determined by an exercise of judicial discretion.³

The High Court in *Stanford v Stanford* indicated that this involved an error of statutory interpretation. It indicated that a court, exercising jurisdiction under the Act, had to consider, in every case, whether it was just and equitable to make *any* alteration of property rights before determining the extent of such an adjustment. This is the principle of judicial restraint.

This article reviews decisions since *Stanford v Stanford* which have applied this principle. It has particular application in cases where the parties have kept their assets separate and there are no children of the relationship. These cases represent an important corrective to the jurisprudence of family property law, and demonstrate that after years in which family property law was based upon community property assumptions, there may after all, be a future for separate property norms, with appropriate powers to alter property rights in those cases where such an adjustment is appropriate.

To understand the significance of this new line of decisions, it is necessary first of all to explain the influence of community property approaches in Australian family law.

II THE FAMILY LAW ACT AND DEFERRED COMMUNITY PROPERTY

Most family property systems around the Western world have some variation on the idea that property acquired in the course of the marriage is jointly owned.⁴ In many parts of Europe, there is a system of community of *acquets* – that is, all the property acquired after the marriage other than gifts to one party or inheritances is 'community property'.⁵ Other property is regarded as separate property. Rules vary as to how to deal with separate property which becomes mixed with community property.⁶ An equal sharing of the marital property is also

2 (2012) 247 CLR 108.

3 See Patrick Parkinson, 'Quantifying the Homemaker Contribution in Family Property Law' (2003) 31 *Federal Law Review* 1.

4 Margaret F Brinig, 'Marital Property' [2016] *International Survey of Family Law* 509, 512–14.

5 For a history, see William Wirt Howe, 'The Community of *Acquests* and Gains' (1903) 12 *Yale Law Journal* 216.

6 See, eg, Jens M Scherpe, 'A Comparative Overview of the Treatment of Non-matrimonial Assets, Indexation and Value Increases' (2013) 25 *Child and Family Law Quarterly* 61.

the most common approach across the United States, although only nine states have a formal community property system.⁷

In the past, a few countries have had a default rule that all property, whether owned before or after the marriage, becomes jointly owned on the wedding day. This is known as ‘universal marital community of property’. It has historically been the position in the Netherlands, for example,⁸ but from the beginning of 2018, the default rule for those entering new marriages will be a community of *acquests*.⁹ All such systems also allow for a further distribution of assets to meet the greater needs of one of the parties,¹⁰ most typically the woman, whether it is through an adjustment to the assets of the parties, spousal maintenance, or as in France, a lump sum compensatory payment.¹¹

Germany and the Scandinavian countries adopt a different approach. In Germany, the property is in separate ownership during the course of the marriage, but on divorce the difference between what was owned at the beginning of the relationship and at its end is divided equally.¹² This is known as a deferred community regime. In the Scandinavian countries, all property, including that acquired prior to the marriage, is susceptible to equal sharing, but courts have a greater or lesser discretion to depart from equality where such a result would be inequitable, for example because of property owned before the marriage or acquired by inheritance.¹³ In New Zealand, the parties to a marriage or de facto relationship are entitled to an equal share of the family home on separation, divorce or death once the couple have been in a relationship for three years, even where it was solely owned by one party, and unencumbered, before the relationship began.¹⁴ In all of these deferred community property systems, the legal title to the property is irrelevant to how it is to be distributed on marriage breakdown.

7 Lynn Dennis Wardle and Laurence C Nolan, *Family Law in the USA* (Kluwer Law International, 2011) 226. See also J Thomas Oldham and Patrick Parkinson, ‘Evaluating Judicial Discretion – Family Property Law in Australia and the USA Compared’ (2016) 30 *Australian Journal of Family Law* 134.

8 *Burgerlijk Wetboek* [Civil Code] (Netherlands) art 1:94. See also art 1:93 of the *Civil Code* prior to 2012, which reads: ‘A general community of property exists between the spouses by operation of law from the time of the solemnisation of the marriage insofar as no derogation is made therefrom by a marriage contract’: Ian Sumner and Hans Warendorf (eds) trans, *Family Law Legislation of the Netherlands: A Translation Including Book 1 of the Dutch Civil Code, Procedural and Transitional Provisions and Private International Law Legislation* (Intersentia, 2003) 60.

9 Carla Smeets and Caroline Soeters, ‘Family Law in The Netherlands: Overview’ on Thomson Reuters, *Practical Law* (1 September 2017) <[https://uk.practicallaw.thomsonreuters.com/4-578-1948?bhcp=1&transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/4-578-1948?bhcp=1&transitionType=Default&contextData=(sc.Default))>.

10 In the United States, see J Thomas Oldham, ‘Economic Consequences of Divorce in the United States: Recent Developments’ in John Eekelaar (ed), *Family Law in Britain and America in the New Century: Essays in Honor of Sanford Katz* (Brill Nijhoff, 2016) 55.

11 The ‘prestation compensatoire’: *Code Civil* [Civil Code] (France) arts 270–81. The principles for calculating the compensatory payment are discussed in the special issue: ‘Calcul de la Prestation Compensatoire’ [2010] (9) *Actualité Juridique Famille* 349. See also Helen Stalford, ‘Family Law’ in John Bell, Sophie Boyron and Simon Whittaker (eds), *Principles of French Law* (Oxford University Press, 2nd ed, 2008) 243, 254–5.

12 For a history, see Max Rheinstein, ‘Transformation of Marriage and the Law’ (1973) 68 *Northwestern University Law Review* 463, 468–74.

13 Scherpe, above n 6, 66.

14 *Property (Relationships) Act 1976* (NZ) s 11(a).

In England, a deferred community approach was to a substantial extent brought in by case law with the House of Lords' decision in *White v White*¹⁵ and the various cases that have followed since.¹⁶ While Baroness Hale observed in *Miller v Miller; McFarlane v McFarlane* that '[w]e do not yet have a system of community of property, whether full or deferred',¹⁷ the shift has been unmistakably in that direction in all but short marriages.¹⁸ In Scotland, there is a formal distinction in the legislation between matrimonial property and other property. The net value of the matrimonial property should either be 'shared equally or in such other proportions as are justified by special circumstances'.¹⁹

What then of Australia? Property is owned according to legal and equitable title prior to the breakdown of the relationship and an application being made to the court to alter those rights. Its family property regime on relationship breakdown is very hard to classify, not least because there is little agreement between different benches of the Full Court of the Family Court on the principles for quantifying shares in various circumstances,²⁰ including where property was owned prior to the marriage,²¹ where there are debts incurred by one party during the course of the marriage (for example, to the Australian Taxation Office)²² and in relation to inheritances.²³

Nonetheless, there is much to be said for the view that the Australian approach has been one of deferred community property, at least as far as property acquired during the course of the relationship, other than by gift or inheritance, is concerned. Legal title has, in the past, been treated as of little importance except in short marriages (lasting less than four to five years). The legislation requires a backwards-looking assessment combined with a forward-looking evaluation. The applicable sections are section 79 of the Act (in relation to marriages) and section 90SM (in relation to de facto relationships). Section 79(4) (and section 90SM(4) for de facto couples) requires the court to determine whether it is just and equitable to alter property rights, taking into account the contributions made directly or indirectly to the acquisition, conservation or improvement of property

15 [2001] 1 AC 596; see also Stephen Cretney, 'Community of Property Imposed by Judicial Decision' (2003) 119 *Law Quarterly Review* 349, 349.

16 See, eg, *Charman v Charman [No 4]* [2007] 1 FLR 1246; *Jones v Jones* [2012] Fam 1.

17 [2006] 2 AC 618, 664 [151].

18 See *Sharp v Sharp* [2017] 4 All ER 1046.

19 *Family Law (Scotland) Act 1985* (UK) c 37, s 10. For commentary, see Jane Mair, Enid Mordaunt and Fran Wasoff, 'Built to Last: The *Family Law (Scotland) Act 1985* – 30 Years of Financial Provision on Divorce' (Research Report, Nuffield Foundation, 2016).

20 Patrick Parkinson, 'Why Are Decisions on Family Property So Inconsistent?' (2016) 90 *Australian Law Journal* 498, 501–11.

21 Cf *In the Marriage of Lee Steere* (1985) 10 Fam LR 431; *In the Marriage of Aleksovski* (1996) 135 FLR 131; *In the Marriage of Pierce* (1998) 24 Fam LR 377; *Williams & Williams* [2007] FamCA 313; *Cook & Langford* [2008] FamCAFC 84; *Cabbell & Cabbell* [2009] FamCAFC 205; *Agius & Agius* [2010] FamCAFC 143.

22 Cf *In the Marriage of Johnson* (1999) 26 Fam LR 485; *Commissioner of Taxation v Worsnop* (2009) 40 Fam LR 552; *Trustee of Property of Lemnos v Lemnos* (2009) 223 FLR 53; *Adair & Milford* [2015] FamCAFC 29.

23 Cf *In the Marriage of Bonnici* (1991) 105 FLR 102; *In the Marriage of Figgins* (2002) 173 FLR 273; *In the Marriage of Wall* (2002) 167 FLR 461; *Mistle & Mistle* [2010] FamCA 29; *Singerson & Joans* [2014] FamCAFC 238.

and to the welfare of the family, including as a homemaker and parent. The court must also consider the factors contained in section 75(2) of the Act (or section 90SF(3) for de facto relationships), so far as they are relevant. These are the same factors that the court must consider in making determinations about spousal maintenance.

The idea of equality has had a powerful gravitational effect when assessing contributions even in cases where one party has brought property into the relationship or received it through an inheritance. There is no presumption of equality, nor a starting point to this effect;²⁴ but where there was no significant pre-marital property, and no inheritances or damages awards, a conclusion of equality of contribution has been all but inevitable. In *Waters and Jurek*,²⁵ Fogarty J stated that in ‘the majority of property cases little difficulty is encountered in the contribution step and increasingly in the general run of cases the conclusion is likely to be one of equality or thereabouts’.²⁶ Later in the judgment, he explained:

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. Homemaker contributions are to be given as much weight as those of the primary breadwinner.²⁷

In a straightforward case where the parties brought little into the marriage and there were no subsequent inheritances, that conclusion of equality of contribution is typically uncontroversial.²⁸ The position is much more uncertain where property was brought into the marital relationship, or acquired subsequently by inheritance. In these circumstances, the case law in Australia has seemed to lie somewhere between a community of *acquests* approach and universal community.²⁹ The longer the marriage lasts, typically the less weight is given to assets brought into it,³⁰ but no principles have been articulated on how to make that assessment, other than that the judge must ‘weigh’ all the different contributions.³¹ It remains unclear how purely inflationary increases in the

24 *Mallet v Mallet* (1984) 156 CLR 605, 610 (Gibbs CJ), 625 (Mason J), 639, 640 (Deane J).

25 *In the Marriage of Waters and Jurek* (1995) 126 FLR 311 (*‘Waters and Jurek’*).

26 *Ibid* 318.

27 *Ibid* 321–2.

28 There have been arguments about whether an entrepreneurial spouse’s contribution should be regarded as ‘special’ in cases where substantial wealth has been accumulated (see, eg, *In the Marriage of Ferraro* (1993) 111 FLR 124; *In the Marriage of JEL and DDF* (2001) 163 FLR 157), but the latest case law disavows the idea of special contributions: *Hoffman v Hoffman* (2014) 51 Fam LR 568; *Fields v Smith* (2015) 53 Fam LR 1, discussed below.

29 The Full Court’s decision in *In the Marriage of Bremner* (1994) 18 Fam LR 407 is an example of an outcome consistent with an approach of universal community after a marriage lasting more than 20 years.

30 Patrick Parkinson, ‘The Diminishing Significance of Initial Contributions to Property’ (1999) 13 *Australian Journal of Family Law* 52.

31 *In the Marriage of Pierce* (1998) 24 Fam LR 377, 377–8 [28] (The Court):

It is necessary to weigh the initial contributions by a party with all other relevant contributions of both the husband and the wife. In considering the weight to be attached to the initial contribution, in this case of the husband, regard must be had to the use made by the parties of that contribution.

value of an asset owned prior to marriage,³² or the pre-marriage value of a superannuation fund,³³ are to be dealt with.

III THE IMPORTANCE OF *STANFORD V STANFORD*

While deferred community property ideas have clearly influenced Australian law over the years, it can no longer be regarded as the standard approach in all cases in the light of the High Court's decision in *Stanford v Stanford*.³⁴ There is now a strand of authorities applying *Stanford v Stanford* which repay careful attention. In these cases, the emphasis on the need to justify the alteration of property rights at law and in equity has had real impact – and rightly so.

Stanford v Stanford involved an application brought by a daughter as her mother's case guardian. The case was continued after the mother's death. The application sought a property settlement for the wife in circumstances where the parties' relationship had not broken down. She was in a nursing home. The High Court, overturning the decisions of the lower courts, determined that it would not have been just and equitable to alter the property interests of the parties to the marriage prior to the wife's death. Consequently, it was not appropriate to do so after she had died.³⁵

The main judgment was given by French CJ, Hayne, Kiefel and Bell JJ (the 'plurality'). Heydon J gave a brief concurring judgment. Central to the reasoning of the plurality was section 79(2) of the Act which states that '[t]he 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'.

The High Court reasoned that there was simply no justification in this case to make any orders at all, given that the husband continued to care for, and provide for, his wife who was in residential care.

In giving its reasons for decision, the High Court set out three fundamental propositions. The first was that 'it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties in the property'.³⁶

The second was that while section 79 of the Act confers a broad power to make a property settlement order, 'it is not a power that is to be exercised according to an unguided judicial discretion'.³⁷ Their Honours repeated the observations of four members of the High Court in *R v Watson; Ex parte Armstrong* that the judge exercising jurisdiction in relation to property and

32 For discussion, see *Kardos v Sarbutt* (2006) 34 Fam LR 55; *Williams & Williams* [2007] FamCA 313.

33 See *McKinnon and McKinnon* (2005) FLC ¶93-242; *Coghlan and Coghlan* (2005) FLC ¶93-220; *M v M* (2006) 203 FLR 122; *Palmer & Palmer* [2012] FamCAFC 159.

34 *Stanford v Stanford* (2012) 247 CLR 108.

35 *Family Law Act 1975* (Cth) s 79(8)(b).

36 (2012) 247 CLR 108, 120 [37] (French CJ, Hayne, Kiefel and Bell JJ) (emphasis in original).

37 *Ibid* 120 [38] (French CJ, Hayne, Kiefel and Bell JJ).

maintenance is not entitled to do ‘palm tree justice’.³⁸ The judge must exercise his or her wide discretion in accordance with legal principles. The plurality in *Stanford v Stanford* continued:

Because the power to make a property settlement order is not to be exercised in an unprincipled fashion, whether it is ‘just and equitable’ to make the order is not to be answered by assuming that the parties’ rights to or interests in marital property are or should be different from those that then exist. All the more is that so when it is recognised that s 79 of the Act must be applied keeping in mind that ‘[c]ommunity of ownership arising from marriage has no place in the common law’. Questions between husband and wife about the ownership of property that may be then, or may have been in the past, enjoyed in common are to be ‘decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons who are not spouses’. The question presented by s 79 is whether those rights and interests should be altered.³⁹

The third proposition was that in determining whether making a property settlement order is ‘just and equitable’ the Court must not begin:

from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in s 79(4).⁴⁰

Their Honours commented:

To conclude that making an order is ‘just and equitable’ *only* because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act.⁴¹

As the plurality of the High Court emphasised in *Stanford v Stanford*, Australia is not a community property jurisdiction. Property rights are altered neither by cohabitation nor by marriage. The starting point in any case is to identify legal and equitable title to the assets. Then the question to be asked is whether the parties’ rights in those assets should be altered. The right to apply under section 79 or section 90SM of the Act gives no entitlement to an interest in property held in the name of another prior to any order of a court. It is not a proprietary chose in action.⁴²

The Court’s approach in *Stanford v Stanford* treated section 79(2) as a restraint upon judicial power. There is a similar provision, section 90SM(3), applicable to the breakdown of de facto relationships. After *Stanford v Stanford*, a finding that it is just and equitable to alter the existing property rights is, in effect, a statutory precondition to the making of any order under section 79 or section 90SM. This was affirmed by Bryant CJ and Thackray J in *Bevan v Bevan*.⁴³ They indicated that *Stanford v Stanford* should ‘serve as a reminder to trial judges that the precondition to making any order is a finding that it is just and equitable to do so’. They went on to say that ‘the power to make any order

38 (1976) 136 CLR 248, 257 (Barwick CJ, Gibbs, Stephen and Mason JJ).

39 (2012) 247 CLR 108, 121 [39] (French CJ, Hayne, Kiefel and Bell JJ).

40 Ibid 121 [40] (French CJ, Hayne, Kiefel and Bell JJ).

41 Ibid.

42 *Bryson & Pember* [2013] FamCA 43, [37] (Forrest J).

43 (2013) 279 FLR 1, 15 [70].

adjusting property interests is conditioned upon the court finding that it is just and equitable to make an order'.⁴⁴

Because section 79(2) is a statutory condition and not just a factor to be considered alongside many others at the discretion of the court,⁴⁵ determining that it is just and equitable to alter existing property interests requires a serious and conscious reasoning process towards a determination of that issue.

Stanford v Stanford clearly required a shift in thinking about the role of section 79(2), for previously it had often been treated as representing a positive requirement, rather than a restraint upon power. That is, courts understood it to be a requirement to do what is just and equitable. In *Hickey*, for example, the fourth step is stated to be for the court to consider its findings and to 'resolve what order is just and equitable in all the circumstances of the case'.⁴⁶ In a similar vein, Bryant CJ, Finn and Coleman JJ wrote in *Coghlan and Coghlan* that section 79(2) imposes an *obligation* to make a just and equitable order.⁴⁷ In other words, the courts saw it as a subsection which conferred a broad discretion and an obligation about the kind of orders to make, rather than acting as a *constraint* upon making any orders at all.

IV *BEVAN V BEVAN*: THE READING DOWN OF *STANFORD*

Although the three fundamental propositions in *Stanford v Stanford* might have appeared to challenge the deferred community property approach, the Full Court of the Family Court was quick to downplay the significance of *Stanford v Stanford* in its first major consideration of its implications. It seemed to be the thrust of Bryant CJ and Thackray J's judgment in *Bevan v Bevan*⁴⁸ that the three fundamental propositions represented the longstanding jurisprudence of the Court or required little alteration to its methodology. They wrote: 'The first "fundamental proposition", which requires identification of existing legal and equitable interests in property, is nothing new'.⁴⁹ They went on: 'The second "fundamental proposition" laid down in *Stanford v Stanford* is also not novel'.⁵⁰ They acknowledged that the third proposition required more consideration, but thought that the factors in section 79(4) needed to be considered in determining whether it is just and equitable to make any order, while avoiding the conflation of the two sections.⁵¹ They also emphasised another, obiter, passage of the plurality of the High Court in *Stanford v Stanford* which recognised the

44 Ibid 15 [70]–[71].

45 This appears to have been doubted by Strickland J in *Hearne v Hearne* (2015) 53 Fam LR 454, 465 [65]–[66], but without considering the specific passages at [70]–[71] of *Bevan v Bevan* concerning a finding on section 79(2) as a precondition to the validity of an order under section 79. See also Parkinson, 'Why Are Decisions on Family Property So Inconsistent?', above n 20.

46 *In the Marriage of Hickey* (2003) 30 Fam LR 355, 370 [39] (The Court) ('*Hickey*').

47 *Coghlan and Coghlan* (2005) FLC ¶93-220, 79 645 [58].

48 (2013) 279 FLR 1.

49 Ibid 16 [74].

50 Ibid 17 [80].

51 Ibid 17 [84]–[85].

justification for altering property rights in ‘many cases’ where the husband and wife are no longer living in a marital relationship.⁵² They indicated that there would be a need to alter property rights in *most* cases following a relationship breakdown.⁵³ These comments in *Bevan v Bevan* may have done much to give the impression that it was ‘business as usual’, with *Stanford v Stanford* relegated to a footnote in the jurisprudence of the court.

When Bryant CJ and Thackray J said in *Bevan v Bevan* that in most cases, there would be a need to alter property rights, they may have overlooked how many cases there are in which either the parties already hold title jointly, with no need for an adjustment for future needs, or in which the parties have chosen to keep their finances largely or entirely separate. Particularly in cases involving couples who do not have children together, the question must be asked, in more than a perfunctory way, why it is that any orders altering property rights are needed at all?

V WHERE TITLE IS ALREADY JOINT

An example of where, in the aftermath of *Stanford v Stanford*, that question should have been asked is the well-known case of *Fields v Smith*.⁵⁴ The trial judge, Murphy J, had originally decided this case before the decision in *Stanford v Stanford*.⁵⁵ It was what is colloquially known as a ‘big money’ case. The parties’ marriage lasted 29 years. The husband had left school at 15. The parties had married when the husband was 21 and the wife was 18. They had done extraordinarily well in the intervening years. The net assets of the parties were found to have a value at trial of between \$32 321 000 and \$39 816 000.

Murphy J considered that while both parties contributed substantially to the financial success, the husband should be regarded as having made the greater contribution. He had run the business. Benchmarking against previous ‘big money’ cases involving substantial wealth accumulated over long marriages, he assessed contributions as 60–40 per cent in favour of the husband. The 40 per cent share to the wife was at the upper end of the spectrum of cases which were once decided with reference to the idea that one party may have made a ‘special’ contribution (although Murphy J eschewed such language).⁵⁶

The Full Court eventually handed down its decision overturning the trial judge. It considered that the result should have been 50 per cent each. It gave lengthy reasons for this conclusion with reference to the 2014 decision of *Hoffman v Hoffman*⁵⁷ which had indicated that the doctrine of special contributions should no longer be accepted. The Full Court considered that there had been an inconsistency between Murphy J’s reasoning and the result.

52 (2012) 247 CLR 108, 122 [42] (French CJ, Hayne, Kiefel and Bell JJ).

53 *Bevan v Bevan* (2013) 279 FLR 1, 15 [70].

54 (2015) 53 Fam LR 1.

55 *Smith & Fields* [2012] FamCA 510.

56 See above n 28.

57 (2014) 51 Fam LR 568.

In this lengthy discourse, one significant fact seems to have been overlooked. Going into the case, the parties had an equal shareholding in the family business and they owned the (very valuable) family home jointly.⁵⁸ In fact, apart from some jewellery, everything was jointly owned.⁵⁹

It is no criticism of Murphy J that he decided the case in the way he did with reference to the law prior to *Stanford v Stanford*. However, in light of the High Court's decision, another question might have been asked on appeal. Given that the wife already had 50 per cent of the assets, what was the justification for depriving her of 10 per cent of them? If the question had been framed in that way, it may well be that the Court would have been unable to come up with any reason in justice or equity why property rights should be altered, with the consequence that the result would have been one of equality in any event. Arguably, having treated his wife as an equal partner throughout the relationship, as was reflected in the state of the legal title, the husband in *Fields v Smith* ought not to be heard to argue that on divorce, the parties should now be treated unequally on the basis of contributions. Joint and equal ownership of all assets, including the business assets, had formed the substratum of their financial relationship.

VI WHERE THE PARTIES HAVE KEPT THEIR FINANCES SEPARATE

There are also cases where the parties' own decision to keep their assets separate has had a material impact upon the result.

A *Watson v Ling*

One post-*Stanford v Stanford* example of this is the 2013 decision of Murphy J in *Watson v Ling*.⁶⁰ This was an application made by the male partner in a de facto relationship (Mr Watson) against Ms Ling, his former partner. Three months after the application was lodged, Mr Watson died, and so the action was continued by his personal representative, who happened to be his ex-wife.

Mr Watson and Ms Ling had no children together. The duration of their de facto relationship was a matter in dispute, but it was somewhere between four and five years. At the time of his death, Mr Watson had almost no assets. He had been a bankrupt. Ms Ling had a number of properties, and her assets were given a total value of nearly \$1.3 million; but the properties were heavily geared and so the net assets, including superannuation, were less than \$150 000. While Ms Ling purchased three of the properties during the course of the relationship, Mr Watson made no contribution, financial or otherwise, in relation to these properties. The parties each ran their own businesses during the course of their

58 Murphy J described it as 'an extraordinary homage to conspicuous wealth': *Smith & Fields* [2012] FamCA 510, [3].

59 *Ibid* [34].

60 (2013) 49 Fam LR 303.

relationship and retained their own income. Each contributed to household outgoings. They kept separate bank accounts and never maintained a joint bank account.

Murphy J declined to make any order for alteration of property interests for various reasons,⁶¹ including that it was a short relationship in which the parties lived essentially independent financial lives. They ran their own businesses independently of each other. No business income or expenses were shared. The interests in property existing immediately prior to Mr Watson's death were overwhelmingly those of Ms Ling and were acquired by her without financial input from him. Nor did he contribute to the payment of mortgages, rates and other outgoings, apart from sharing the utilities for the property owned by Ms Ling in which he resided. Indeed, Ms Ling provided a place for Mr Watson to live without him paying rent or board regularly. He made only minor contributions to repairs, maintenance and other work in and about Ms Ling's properties.

In other words, there was simply no equity which needed to be satisfied. Mr Watson was a bankrupt for much of the relationship. Yes, he had shared expenses, but they otherwise had separate property. There was no injustice which would result if property rights were left where they stood.

Watson v Ling illustrates an issue which is of central importance in cases of this kind. In almost all marriages and de facto relationships, there is a process of mutual benefit conferral.⁶² Each spouse confers benefits on the other – perhaps different kinds of benefits – but benefits nonetheless. Mrs Watson argued, on behalf of her late husband's estate, that he had conferred benefits on Ms Ling. Perhaps he had; but Ms Ling had conferred benefits upon him as well. We tend to see cases in family property law through the lens of the claimant who argues what contributions he or she has made; but what about the contributions by the other of which he or she has been the beneficiary?

This can be an issue in particular in relation to contributions to the running of the household. Even if finances have been kept largely separate, it may be argued, the claimant has made a contribution as homemaker in terms of cooking, washing up, household maintenance and in a variety of other ways.

However, typically, relationships involve a degree of mutuality. The claimant spouse may have benefited from the other's work in contributing to the household also; or from the provision of accommodation while they were living together; or the other party may have paid for family holidays or cared for the claimant's children from a previous relationship. In order to show that it is just and equitable to alter property rights, it is insufficient to be able to point to one party's contributions. What is needed, in cases where finances have been kept separate, is to show that there has been an imbalance of contributions or there are financial needs arising from the breakdown of the relationship that would make it unjust or inequitable if property rights were left unaltered.

61 Ibid 314 [73].

62 For further explanation of this concept see Patrick Parkinson, 'Beyond *Pettkus v Becker*: Quantifying Relief for Unjust Enrichment' (1993) 43 *University of Toronto Law Journal* 217.

No such case could be made out on the facts of *Watson v Ling*. Indeed, arguably, Mr Watson received much more than he gave in terms of the financial benefits to him of that relationship. Even if he had not died prior to the hearing of the case, his financial needs would not have been as a consequence of the breakdown of the relationship, for he entered it as a bankrupt.⁶³

B *Fielding and Nichol*

Watson v Ling involved a relatively short relationship. *Fielding and Nichol*⁶⁴ involved a much longer one. The outcome, though, was the same. The trial judge, Thackray CJ, declined to alter property rights.

The parties lived together in a de facto relationship for 12 years. The male partner was 74 at the date of the hearing and the female partner was 66. They had resided in the female partner's home throughout their relationship, and, at the male partner's insistence, had maintained their finances almost entirely separately. The female partner was content with this arrangement. There was one joint account for limited shared expenses. Otherwise household bills and the cost of groceries were met equally, apart from the telephone bill which was usually paid as per the itemised usage. When they separated, they split the funds in their joint account and divided up their art supplies, "right down to counting out coloured beads" in equal shares.⁶⁵ The male partner sought an equal division of the assets, which primarily comprised the real estate each party owned before the commencement of their relationship. The female partner argued it would not be just and equitable to make any orders altering property interests. She proposed that the male partner's application be dismissed.

Thackray CJ accepted the female partner's arguments because the parties had agreed to keep their finances largely separate and property separate. The great bulk of the assets existed at the time of the hearing in precisely the same form in which they were held at the commencement of the relationship. There was no evidence of any change of position by the male partner in living in female partner's home. Neither made provision for the other in their wills (apart from in relation to the female partner's car, which he would inherit). The extent of the work done by the male partner around the female partner's property was not such that it would be just and equitable to adjust existing property interests, especially given that he had free accommodation. Finally, both had assets to live off into the future – there was no case for an adjustment for future needs.

In case he was wrong in treating the matter as a question of whether any order was just and equitable, Thackray CJ went on to consider whether the result would be any different if he had undertaken a conventional evaluation of contributions and adjustment factors. Because of the greater initial contributions of the female partner, he concluded that on an assessment of contributions he

63 On the constitutional issues concerning the circumstances in which an adjustment based upon future needs is warranted, see Patrick Parkinson, 'Constitutional Law and the Limits of Discretion in Family Property Law' (2016) 44 *Federal Law Review* 49.

64 [2014] FCWA 77.

65 *Ibid* [21] (Thackray CJ).

would award 62.5 per cent of the assets to her, with the consequence that the male partner would need to make a modest payment to her. He would not make any adjustment on the basis of the legislative factors in Western Australia that are equivalent to section 75(2) of the Act.⁶⁶ Of course, she had not sought any property alteration in her favour. Consequently, the result would have been the same.

In going through this conventional contribution analysis, Thackray CJ applied the gloss on the statute which has become habitual for judges exercising this jurisdiction. As he applied the law, he imagined a 'pool' which should be divided in percentage terms; but, of course, the legislation says nothing about a 'pool',⁶⁷ and in this case nothing was jointly owned. The High Court has rejected any idea of implicit joint ownership of relationship assets;⁶⁸ and nor does the legislation say that the court should make an assessment of contributions in percentages.

This case illustrates that even on a conventional application of the relevant contribution factors, the result may be that it is just and equitable to leave property rights intact. In this case, the male partner had no claim in justice or equity to receive at the end of the relationship more than he brought into it. The assets were essentially the same at the time of the hearing as at the commencement of the relationship. They had agreed to keep their finances almost entirely separate. It followed that there was no justification for altering property rights.

C Evaluating Financial Contributions

It is worth examining what a close application of section 79(4) or section 90SM(4) might look like in the circumstances of this case in contrast with the broadbrush and holistic approach which is habitual. Just as careful attention needs to be given to the requirement of section 79(2) or its equivalents, so close attention needs to be paid to what Parliament has said about the assessment of contributions to assets. Because there is no community property in Australia, there may be, in any given case, up to five pools of assets:

1. What party A owns;
2. What party B owns;
3. What the parties own jointly;
4. Party A's superannuation entitlements; and
5. Party B's superannuation entitlements.

The legislation requires the court to identify those assets and their title, and then to ask, in relation to each of the assets, or the assets as a whole:

- (a) What financial contribution each has made directly or indirectly to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them; and

66 *Family Court Act 1997* (WA) s 205ZD.

67 On this issue, see *Bevan v Bevan* (2013) 279 FLR 1, 28–9 [158]–[159] (Finn J).

68 *Stanford v Stanford* (2012) 247 CLR 108.

- (b) What contribution (other than a financial contribution) each has made directly or indirectly to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them.⁶⁹

These subsections also require the court to consider assets that used to belong to the parties or either of them.

D The Homemaker Contribution in Childless Relationships

Yes, the court must also consider contributions to the welfare of the family, including contributions as a homemaker and parent (section 79(4)(c) and section 90SM(4)(c)); but in a situation such as in *Fielding and Nichol* where the parties have come together later in life and one has not sacrificed income and earning capacity to care for the couple's children, the homemaker and parent issue is scarcely relevant. For reasons I have explained in an earlier article,⁷⁰ section 79(4)(c) or its equivalents does not require any detailed examination of who did the cooking and washing up, or who took out the bins, mowed the lawn and changed the lightbulbs. That is simply not what the reference to contributions as homemaker and parent ever meant.⁷¹

The homemaker and parent contribution has its real significance in cases where there is role specialisation in the marriage relationship, especially for women who stay at home or limit their workforce participation in order to look after children. As Fogarty J explained in *Waters and Jurek*, in the passage quoted above,⁷² the purpose of assessing the homemaker contribution is to recognise its significance in the overall socio-economic partnership, ensuring that women are not disadvantaged by their role specialisation. Parliament recognised that women's most substantial contribution to the marriage partnership may not be in terms of earnings from paid work, and that their contribution as homemaker and parent should not be undervalued in comparison with direct financial contributions from paid employment.

In a relationship where there are no children of the union, the question arises whether the contributions in section 79(4)(c) and section 90SM(4)(c) justify an alteration in property rights not otherwise justified by financial contributions. It is not that the contribution to the welfare of the family is irrelevant in cases where the couple have no children or there is no role specialisation. Parliament has required judges to take it into account without limiting it in this way. The problem is rather that in situations where there is no role specialisation as homemaker and parent, and each has maintained their participation in the workforce in circumstances unaltered by the relationship, there is very often no reasonable basis for saying that one party has contributed more to the welfare of the family constituted by the couple than the other one has.

It is not even a question of comparing the quantity of indoor work in the home with the quantity of outdoor work, if one did more than the other in each

69 *Family Law Act 1975* (Cth) ss 79(4)(a)–(b), 90SM(4)(a)–(b).

70 See Parkinson, 'Quantifying the Homemaker Contribution', above n 3.

71 *Ibid.* For an early explanation of the rationale for taking account of homemaker and parent contributions, see Evatt CJ in *In the Marriage of Rolfe* (1977) 25 ALR 217, 219.

72 (1995) 126 FLR 311, 321. See text accompanying n 27.

sphere. These are only two elements of the work needed in running a home and contributing to the welfare of the family. Fogarty and Lindenmayer JJ observed in *Kennon*:

Marriage involves a myriad of matters, large and small, which go to make up that union and differentiate it from more casual, transitory relationships. It involves sharing the minutiae of daily life, support during good and bad times, care and intimacy.⁷³

In the absence of a rational basis for saying that one's contribution to the welfare of the family was significantly greater than that of the other, it is a reasonable conclusion that contributions were equal.

E Avoiding the Gloss on the Statute

So the statutory questions, in cases in which a childless couple have kept their finances substantially separate, require an exploration, inter alia, of the extent to which party A has made a contribution to the acquisition, conservation or improvement of any of the property of party B (whether or not still owned), and the extent to which party B has made a contribution to the acquisition, conservation or improvement of any of the property of party A. If party A has made a contribution to party B's assets (for example by way of conservation) and party B has made a contribution to party A's assets, is the imbalance of contributions such that it is just and equitable to alter property rights? That question might be answered, for example, by asking whether party A would be unjustly enriched if title were to be left unaltered, or conversely whether party B would be unjustly enriched. If the mutual benefits conferred in relation to the property of the other are approximately equal there is no justification for altering property rights on the basis of contributions. Examination must then turn to the section 75(2) factors or their equivalents.

By asking what percentage each party contributes to the single (and implicitly jointly owned) asset pool, the trial judge in family property cases habitually asks a question that is different from that required by statute. It may be a sensible approach in very many cases where the court needs to assess contributions to a socio-economic partnership of lives involving the raising of children; but it must always be remembered that it is a gloss on the statute, not actually what the legislation says.

Asking the statutory questions in section 79(4) or its equivalents, in the context of the facts of *Fielding and Nichol*, is not an alternative means of analysis to asking the section 79(2) question whether it is just and equitable to alter property rights given the separation of property of the parties. It leads to the same conclusion *for the same reasons*. On the facts of this case, the male partner had no equity which needed to be satisfied by an alteration of property rights nor needs that could only be met by recourse to his former partner's assets. There may be reasons why an alteration of property rights may not be just and equitable based upon considerations other than an analysis of the statutory factors in section 79(4) and equivalents. Examples include *Stanford v Stanford* and the

73 In the Marriage of *Kennon* (1997) 139 FLR 118, 146–7 ('*Kennon*').

eventual decision of the Full Court in *Bevan v Bevan*.⁷⁴ However, in many cases an analysis of the mutual benefit conferral involved in relationships where the parties have kept their finances separate may lead to the conclusion that there is no justification for a transfer of wealth based on contributions. The only question then is whether an adjustment is justified, based upon future needs and other relevant factors.

F *Chancellor & McCoy*

The Full Court of the Family Court has recently emphasised that even in very long relationships there is no necessary justification for altering property rights. In *Chancellor & McCoy*,⁷⁵ the facts were that the appellant and the respondent, who were both teachers, lived in a same-sex de facto relationship for 27 years. They kept their financial affairs almost entirely separate. They shared joint expenses and there were other financial contributions by one to the other from time to time, but there were otherwise few indications of financially intermingled lives. They lived in homes owned by the respondent. The applicant made contributions of \$100–\$120 per fortnight, the characterisation of which was disputed, but was to assist the respondent with the housing costs in some way.

By the time they separated, the respondent's assets and superannuation were worth more than double those of the appellant, largely because she was better at saving, and salary-sacrificed into her super. The trial judge concluded that it was not just and equitable to make any order for property alteration, applying the High Court's decision in *Stanford v Stanford* and the decision of Thackray CJ in *Fielding and Nichol*.

Judge Turner justified this because the parties conducted their affairs in such a way that neither party would or could have acquired an interest in the property owned by the other. There was no intermingling of finances.⁷⁶ The Full Court agreed. It affirmed strongly that there is no community of property in Australia. Bryant CJ, Thackray and Strickland JJ observed:

The somewhat unusual manner in which the parties arranged their affairs can be seen as distinguishing the present case from the 'many cases' referred to in *Stanford* at [42] where there is 'common use of property' and 'express and implicit assumptions that underpinned the existing property arrangements'.

There was, of course, 'common use' of the homes owned by the respondent, but there was also a modest periodic payment by the appellant referable to her occupation of those homes. Furthermore, her Honour made no findings that would point to any 'express and implicit assumptions' that the parties would ultimately share in the other's property. On the contrary, her Honour properly placed significance on the fact that neither had taken any steps to ensure that the other would receive their property or superannuation in the event of death, and indeed the respondent had executed a will giving her entire estate to her parents. In the absence of evidence of any assumption by the parties that one would benefit on the death of the other, it would not have been open to her Honour to conclude, without evidence, that there was any assumption that there would be some

74 (2013) 279 FLR 1.

75 *Chancellor & McCoy* (2016) FLC ¶93-752. For a more detailed description of the facts, see the first instance decision: *Chancellor & McCoy* [2016] FCCA 53.

76 [2016] FCCA 53, [59].

redistribution of wealth upon termination of the relationship by means other than death.⁷⁷

This decision is surely correct. This was a childless relationship. It is difficult to see what equity needed to be satisfied in favour of the applicant. Yes, she had made a few contributions under both subsections (a) and (b).⁷⁸ For example, the parties commenced cohabitation in the respondent's home in 1983. Between 1983 and 1984, the parties renovated the home, with the respondent providing the funds and the appellant assisting with the labour. That was a contribution other than of a financial kind, to the improvement of that property. The applicant also made a few financial contributions towards the improvement of the respondent's property; but the applicant also lived in the respondent's home and paid only a modest contribution referable to that occupation. So whatever benefits she conferred on her partner were arguably met by the contributions that her partner made to support her.

What about the section 75(2) factors, or their equivalent for de facto relationships? At the end of a 27-year relationship, one partner had far more to her name than the other. However, an imbalance in financial assets, even after a long relationship, is not per se a reason for adjusting property rights.⁷⁹ As the Full Court indicated in *Clauson*, the power to alter property rights in the Act 'is not an exercise in social engineering'.⁸⁰

The view that the court has no power to redistribute wealth on a Robin Hood basis has been restated in other recent authorities of the Full Court. Boland and Thackray JJ said in *Franklin & Franklin*: 'It is also to be borne in mind that s 75(2), particularly s 75(2)(b), is not to be used a [sic] means of social engineering to re-distribute property'.⁸¹ In *Kavanagh & Metzger*,⁸² the Full Court rejected an argument that the disparity in the parties' respective property entitlements (after taking account of legal fees) justified a significant adjustment under section 75(2), and that the lower one party's share of the assets on the basis of contribution, the larger the section 75(2) factors loom. What the court is required to do, in the context of property and maintenance proceedings, is to determine the parties' respective financial positions as a consequence of the court's contribution-based assessment of their respective shares before considering, at the section 75(2) or section 90SF(3) stage, whether some further adjustment is needed.⁸³

77 *Chancellor & McCoy* (2016) FLC ¶93-752, 81 994-5 [35]-[36].

78 [2016] FCCA 53, [49]-[51] (Judge Turner).

79 For the circumstances where the difference in property values of the parties after the contribution stage is relevant, see *Semperton v Semperton* (2012) 47 Fam LR 626, 654 [145]-[146] (Thackray and Ryan JJ).

80 *In the Marriage of Clauson* (1995) 18 Fam LR 693, 711 (Barblett DCJ, Fogarty and Mushin JJ) ('*Clauson*').

81 [2010] FamCAFC 131, [179].

82 [2010] FamCAFC 201.

83 *Marsh v Marsh* (2014) 51 Fam LR 540, 560-1 [126]-[138] (Murphy J).

VII THE RELEVANCE OF SEPARATE FINANCES WHERE PROPERTY RIGHTS ARE TO BE ALTERED

*Elford v Elford*⁸⁴ illustrates the importance of *Stanford v Stanford* in a situation where section 79(2) was not invoked, and the Court decided to alter property rights. It demonstrates the significance of separate finances to the exercise of discretion.

In this case, the relationship lasted nine years. The parties commenced cohabitation in 2003, married in 2007 and separated in late 2012. The parties largely led separate financial lives. The wife had three dependent children from her previous relationship who were aged three, six and nine years when they began living with Mr Elford.

Mr Elford had won \$623 000 in a lottery a year after cohabitation. He kept it in a term deposit. He had been purchasing lottery tickets using the same numbers since 1995, a fact that the wife acknowledged. She also agreed that she had not contributed to the purchase of the ticket. When asked in cross-examination why she thought the win was a ‘joint contribution’ she replied ‘because we were also in a relationship’.⁸⁵ Towards the end of the relationship, the husband had had a stroke. He became blind and had to have dialysis.

The wife had 6 per cent of the combined assets at the date of hearing. The trial judge awarded the wife a further \$51 000, so that she had just over 10 per cent of the combined assets. She had sought about 32 per cent of the assets.⁸⁶ The appeal was dismissed. On the treatment of the lottery win, the Full Court commented:

The underlying theme of the wife’s case seems to us to be that this was a partnership and therefore there was no necessity to examine discrete financial contributions because everything during the relationship had accrued to the parties as a partnership. That is, the property of the parties or either of them was to be seen as a form of ‘community’ property.⁸⁷

However, the Court emphasised, there is no community property in Australia and there was therefore no error in the trial judge’s approach.⁸⁸ The Court also observed:

Consistent with the fundamental principle emphasised by the High Court in *Stanford v Stanford* ... and the terms of s 79(2) of the Family Law Act 1975 (Cth) (the Act), the case below might have been argued on the basis of an asset by asset approach in which it was contended that the lottery win (or, more broadly, the cash in the term deposit of which it formed part) was property of the husband with respect to which it was not just and equitable to alter existing interests in that property.⁸⁹

84 (2016) 55 Fam LR 247.

85 Ibid 249 [10] (Bryant CJ, Murphy and Cronin JJ).

86 Ibid 248–9 [1], [7] (Bryant CJ, Murphy and Cronin JJ).

87 Ibid 252 [24] (Bryant CJ, Murphy and Cronin JJ).

88 Ibid 253 [27]–[28] (Bryant CJ, Murphy and Cronin JJ).

89 Ibid 253 [29] (Bryant CJ, Murphy and Cronin JJ).

VIII CONCLUSION: THE FUTURE OF SEPARATE PROPERTY

The approach of treating marriages (and now de facto relationships) as a socio-economic partnership in which each makes contributions of various kinds to a common 'pool' of property has a long history. It remains valid as an approach in many cases. However, the cases discussed in this article are a reminder that some relationships are not socio-economic partnerships. In these cases, the parties have freely chosen not to hold everything in common; they have not promised to endow all their worldly goods upon each other, and nor to share everything they have. From a financial perspective, the relationship, in such cases, is more transactional. This decision to keep their finances separate forms part of the substratum of their relationship. The question arises whether it is just and equitable for one party to freely accept (indeed even insist upon) such a separation of finances during the course of the relationship but then to invoke the language of partnership at its end.

Australia is a separate property jurisdiction, and while a generation ago, many might have said that it was outmoded and that the law should reflect community property ideas, the changing demographics of family relationships suggest that in some cases at least, the approach to which *Stanford v Stanford* has been a catalyst, is very modern. Marriage is declining as a family form; an increasing number of people are choosing to live in de facto relationships, not merely as a prelude to marriage but as an alternative to it.⁹⁰ This has implications for a regime of property division on relationship breakdown. Couples in de facto relationships are more likely to retain separate finances. According to one large Australian survey in 2006–07, 83 per cent of married persons had joint accounts, either only joint or combined with separate accounts, with half having only a joint account. Conversely, 85 per cent of persons in de facto relationships had separate accounts, with or without joint accounts.⁹¹

The separate property approach applied in the cases examined respects the parties' autonomy to choose the conditions and values that will underpin their lives together. It also respects the equality of the sexes in a different way to that under the partnership approach. In three out of the four cases discussed, it was women who retained the fruit of their labours and savings, against challenges

90 Sandra Buchler et al, 'The Social and Demographic Characteristics of Cohabitors in Australia: Towards a Typology of Cohabiting Couples' [2009] (82) *Family Matters* 22, 22; Ruth Weston and Lixia Qu, 'Trends in Family Transitions, Forms and Functioning: Essential Issues for Policy Development and Legislation' in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 7, 7–8.

91 Supriya Singh and Clive Morley, 'Gender and Financial Accounts in Marriage' (2011) 47 *Journal of Sociology* 3, 4, 7. There is some evidence from a study in Melbourne on attitudes towards property division on relationship breakdown which indicates that the level of convergence in attitudes between married, heterosexual de facto and same-sex couples is more significant than the level of divergence: Nareda Lewers, Helen Rhoades and Shurlee Swain, 'Judicial and Couple Approaches to Contributions and Property: The Dominance and Difficulties of a Reciprocity Model' (2007) 21 *Australian Journal of Family Law* 123. However, this was a very small empirical study and the authors would not claim that the sample was representative.

from former partners with whom they had had a relationship characterised by separation of finances.

Over 40 years ago, one of America's greatest family law scholars, Professor Mary Ann Glendon, published an article entitled 'Is There a Future for Separate Property?'⁹² Looking then to a future in which many more married women would be economically independent, she observed:

when the widespread expectation that marriage will last only so long as it performs its function of providing personal fulfilment is put together with the reality of unilateral divorce, a diminished sense of economic responsibility after divorce, the increasing economic independence of married women, and the expansion of social welfare, the resulting state of affairs does not lead inevitably to the sharing of worldly goods ... Seen in this light, the system of separation of assets with the possibility it has always offered for purely voluntary co-ownership may come to have the most appeal for the greatest number of people.⁹³

The jurisprudence of family property law is now changing, after *Stanford v Stanford*, to recognise this. Especially in cases involving childless couples who keep their finances separate, the question must be asked in each case: what equity needs to be satisfied by an alteration of property rights? What injustice would result if existing property rights were left intact?⁹⁴ This question needs to be considered in all cases. Whether or not the parties kept their finances separate, the existing legal entitlements may reflect their intentions and the financial substratum of their relationship.

Perhaps that makes law reform in this area more difficult than it was a generation ago. There is a need for much more certainty in this area, so that people can bargain in the shadow of the law. In particular, law reform is needed to overcome the extraordinary inconsistencies of approach that currently plague the Family Court's jurisprudence.⁹⁵ However, a community property approach, or a formalised system of deferred community, assumes a model of marriage which is declining in popularity. As applied to de facto relationships, it may indeed be inconsistent with how a great many couples view their finances.

It follows that there cannot be a one-size-fits-all approach to property division. It may well be that the most important way of differentiating families for the purposes of property division is not whether they are married but whether they have had children together. In such cases, a starting point of equal ownership of the *acquests* of the relationship other than by gift or inheritance is likely to be the fairest assumption to make, taking into account that parents may specialise in terms of child-rearing and career-building respectively, even when both retain their full-time connection to the workforce.⁹⁶

The Australian Law Reform Commission has been asked to examine the substantive law of property amongst its many terms of reference in its review of

92 (1974) 8 *Family Law Quarterly* 315.

93 *Ibid* 327.

94 See Patrick Parkinson, 'Family Property Law and the Three Fundamental Propositions in *Stanford v Stanford*' (2013) 3 *Family Law Review* 80.

95 See Parkinson, 'Why Are Decisions on Family Property So Inconsistent?', above n 20.

96 See generally Catherine Hakim, *Work-Lifestyle Choices in the 21st Century: Preference Theory* (Oxford University Press, 2000).

the family law system.⁹⁷ Arguably, there is a future for retention of a separate property system, together with a need to justify altering legal property rights within a structured framework of discretion which assists courts to apply principled approaches to the division of property.

97 See Australian Law Reform Commission, *Terms of Reference: Review of the Family Law System* (27 September 2017) <<https://www.alrc.gov.au/inquiries/family-law-system/terms-reference>>.