FAULT AND FINANCIAL ADJUSTMENT UNDER THE FAMILY LAW ACT

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The Family Law Act 1975 (Cth) introduced a system of "no fault" divorce. Formerly, the identification of the parties as "innocent" and "guilty" of matrimonial offences had a significant impact on the way the court exercised its powers to make orders relating to maintenance and the property of the parties. It would be possible, even under a system of no fault divorce, for notions of fault to have continuing relevance in financial matters, and indeed the Ruddock Committee recommended that such notions should play a significant role. In this article, Richard Chisholm and Owen Jessep review the case law in the Family Court, the experience of other jurisdictions, and the work of commentators and law reform bodies. They argue that the Ruddock Committee recommendations are misguided, and that the Family Court has been correct in holding that "fault" is essentially irrelevant to financial adjudications.

I. INTRODUCTION

The introduction of the Family Law Bill was accompanied by an extended public and parliamentary debate about the merits and demerits of "no-fault" divorce. That controversy now seems part of history. The Family Law Act provides for divorce only on the ground of "irretrievable breakdown of marriage"[1] (defined as twelve months separation) and in the first major enquiry into the operation of the Act, the Parliamentary Joint Select Committee (the Ruddock Committee) recommended that no change be made in this part of the law.[2] Attention in Australia is now beginning to shift to the many ramifications of no-fault divorce. This paper is concerned with one of these, the impact of no-fault divorce on the law of financial adjustments under the Act. Financial adjustments as treated in this article mean orders of the Family Court by way of maintenance and the distribution of property.[3] The present law gives the court a wide discretion in making financial adjustments. In doing so, should it take into account notions of fault or misconduct?

There has been surprisingly little discussion of the issue in Australia, although the Family Court has considered it on a number of occasions. In other countries,

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however, especially in recent years, it has been the subject of analysis by law reform commissions and commentators. These discussions show that the role of misconduct in financial adjustment needs to be seen not only against the background of no-fault divorce, but also in the context of a re-assessment of the proper objectives of the law today in regulating the economic consequences of family breakdown. The issue has been given a certain urgency in Australia because the Ruddock Committee has recommended that misconduct should play a larger part than it now does in this area of the law.

This article considers what the relevant Australian law is, and whether it needs to be changed. It will be argued that 'misconduct' is, and should remain, irrelevant to financial adjustment.[4]

The scope of this paper is confined to discussion of the legislation and reported case law and studies by commentators and law reform bodies. Although the majority of legal publications are similarly limited, it is important to recognise that these sources do not enable a full assessment to be made of the role of fault in the practical administration of the law. We do not know the extent to which it is taken into account in matters that are settled between the parties, or settled as a result of an agreement worked out in a conference with a registrar under regulation 96 of the Family Law Act 1975 (Cth) ("the Act"). Nor can we assess the extent to which notions of fault operate unconsciously in the minds of judges, influencing decisions formally determined without reference to fault. It is unlikely that the law in its practical application mirrors the law "in the books". An English study of the work of registrars in determining financial matters, for example, found considerable differences in the extent to which fault was regarded as relevant, and some registrars admitted that fault may have played an unconscious part in their adjudications.[5] While the need for empirical investigation of such matters is increasingly recognised by legal scholars, no relevant studies appear to have been carried out in Australia. There is a persistent difficulty in evaluating the merits of legal rules in the absence of systematic information of this sort, and it is to be hoped that the newly established Institute of Family Studies will give priority to studies which assess the actual operation of the law in this and other areas.

II. ANTECEDENTS[6]

The history of this area of law shows notions of matrimonial fault starting as a dominant factor and gradually diminishing. In England, the Matrimonial Causes Act of 1857 effectively transferred the matrimonial jurisdiction of the ecclesiastical courts to the newly created divorce court. The only major innovation was the power given to judges to grant a "true" divorce, that is one entitling the parties to re-marry. Notions of matrimonial misconduct formed the basis of the court's power to grant a decree of dissolution, so that when it came to considering questions of property or maintenance the court already had, in connection with the decree of dissolution, a judicial determination of the "guilty party" (against whom the divorce was granted) and the "innocent party" who had obtained the decree. So dominant was the idea of fault that there was once doubt whether the court would grant any maintenance to a wife who was "guilty". It was very clear that even the

courts held that they had such power, any relief granted to a "guilty" wife was on the basis that it was wrong to allow her to become destitute. An "innocent" wife, on the other hand, was entitled to a substantial portion of the husband's wealth.

The dominance of matrimonial fault reflected conditions and beliefs of the time. First, the wife was legally dependent on the husband: she had no power to make contracts, or sue in her own name, and the law effectively transferred ownership and control of any wealth she might have had to her husband (with some exceptions not necessary to canvass here). Such security as she had was based on her husband's legal obligations to support her, obligations which would be largely destroyed if the wife committed a matrimonial offence.

Secondly, the new secular divorce court inherited the basic rules, traditions and procedures of the earlier ecclesiastical courts. These courts had exercised religious as well as legal authority, and marriage was thought of as having a specific set of obligations, which the courts would enforce. It was not seen as problematic that the ecclesiastical courts should make rulings about what married people should and should not do. These ancient origins may help to explain the confidence with which courts administering family law have made judgments on matters of personal morality which in other contexts are regarded as matters for individuals to resolve for themselves, and on which people may have widely differing opinions.

We need not trace the details of the gradual and uncertain transformation of English law. It involved two important shifts: (i) matrimonial fault came to be determined not merely by reference to the formal decree of dissolution, but also to the court's view of which party bore the major responsibility for the marriage breakdown, and (ii) more recently, fault diminished in significance as against other factors, especially the needs of the parties.

When the Australian colonies passed their own matrimonial legislation in the late nineteenth century, they largely copied the English model.[7] The Commonwealth took over the field by passing the Matrimonial Causes Act 1959.[8] The Court was given power to award "such maintenance as it thinks proper, having regard to the means, earning capacity and *conduct* of the parties to the marriage and all other relevant circumstances".[9] In relation to property, the Court was empowered to make "such a settlement of property...as the court considers just and equitable in the circumstances of the case".[10]

It will be noted that the reference to the parties' conduct in relation to maintenance is not repeated in the provision about property. However, the courts made it clear that the parties' conduct was equally relevant in property adjustments. Thus in the leading case of *Sanders* v. *Sanders,*[11] Barwick C.J. said, in relation to section 86, "the court...may make orders settling the property...No doubt cogent considerations of justice founded on the conduct and circumstances of the parties would need to be present if such orders were to be made".[12] Windeyer J. pointed out the intimate connection between the maintenance power and the property power: "They overlap and may be exercised separately or in combination to produce a total result which in the circumstances of the case is just and equitable".[13]

The importance of fault may be gathered from the comments of Begg J. in 1968:

> In the usual case a wife who has been found guilty of a matrimonial offence will not be awarded maintenance but in certain circumstances sometimes

> orders are made... In other cases where a decree is pronounced against a wife, occasionally it appears that the conduct of the husband has in a substantial way led to the break-up of the marriage, although he himself has not been guilty of any matrimonial offence, substantial justice may require that some small award should be made in favour of the wife, who is unable to adequately support herself, but I think it proper to say that in general terms the occasions when the court feels that it is just and proper to make an order in favour of a guilty wife are rare indeed.[14]

Fleming v. *Fleming*[15] is an example of the general rule formulated by Begg J. There, the wife applied for maintenance after the divorce was granted on the ground of her desertion. She suffered from a form of incurable sclerosis which would eventually lead to death from paralysis. She applied for a nominal order of one shilling which could be increased if she became unable to support herself. Crawford J. refused to make any order, stating that the wife was not yet destitute, that she could rely on support from her family and from social services, that she knew about her disease when she left, and that an order might imperil the husband's chances of re-marriage. Crawford J. also took into account the public interest in the "discouragement of immorality...that wives be not encouraged to think, by the court's indulgence in granting alimony, that they can desert their husbands, and still look to them for support after being divorced".[16]

The decisions, however, are not altogether consistent. In relation to property settlement, for example, it was firmly held that desertion was not of itself a proper basis for any alteration of property rights, since the object was not punishment.[17] Yet in *Eagle* v. *Eagle*[18] an order that the husband transfer the matrimonial home to the wife took into account that he was "wholly to blame for the break-up of this marriage" and was anxious to marry someone else.[19] Similarly in *Forsyth* v. *Forsyth*[20] Carmichael J. ordered the wife to transfer to the husband her half-interest in the matrimonial home. The principal basis of the decision appeared to be that she had

> by deliberate choice abandoned her use and enjoyment of the matrimonial home[21]...Her act of leaving was a considered act, not impelled by the [husband], following a decision to abandon the type of life she had long accepted.[22]

On the eve of the Family Law Act 1975, therefore, misconduct was well entrenched in the law of financial adjustment, although it was of somewhat erratic application. However, it had to compete with other considerations (such as needs and resources) as a factor influencing the court in deciding what was a proper re-distribution of the assets and continuing obligations of divorcing couples.

III. MISCONDUCT AND FINANCIAL MATTERS UNDER THE FAMILY LAW ACT

The public and parliamentary debate about the Family Law Bill was primarily concerned with the introduction of a non-fault ground for divorce. There was relatively little consideration of the status of fault in connection with financial matters. The report of the Select Committee of the Senate, in particular, does not address the issue.[23] The legislative history, therefore, gives little assistance.

It will be convenient to set out the relevant provisions of the Family Law Act:

72. A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, the other party is unable to support herself or himself adequately, whether by reason of having the care or control of a child of the marriage who has not attained the age of 18 years, or by reason of age or physical or mental incapacity for appropriate gainful employment or for any other adequate reason having regard to any relevant matter referred to in sub-section 75(2).

74. In proceedings with respect to the maintenance of a party to a marriage or of a child of a marriage, the court may make such order as it thinks proper for the provision of maintenance in accordance with this Part.

75. (1) In exercising jurisdiction under section 74, the court shall take into account only the matters referred to in sub-section (2).

(2) The matters to be so taken into account are —

(a) the age and state of health of each of the parties;

(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;

(c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years;

(d) the financial needs and obligations of each of the parties;

(e) the responsibilities of either party to support any other person;

(f) the eligibility of either party for a pension, allowance or benefit...

(g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;

(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;

(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;

(l) the need to protect the position of a woman who wishes only to continue her role as a wife and mother;

(m) if the party whose maintenance is under consideration is cohabiting with another person — the financial circumstances relating to the cohabitation;

(n) the terms of any order made or proposed to be made under section 79 in relation to the property of the parties; and

(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

79. (1) In proceedings with respect to the property of the parties to a marriage or either of them, the court may make such order as it thinks fit altering the interests of the parties in the property...

(2) The court shall not make an order under this section unless it is satisfied that, in all circumstances, it is just and equitable to make the order.

(4) In considering what order should be made under this section the court shall take into account:

(a) the financial contribution made directly or indirectly by or on behalf of a party or a child to the acquisition, conservation or improvement of the property, or otherwise in relation or indirectly to the acquisition, conservation or improvement of the property by either party, including any contribution made in the capacity of homemaker or parent;

(c) the effect of any proposed order upon the earning capacity of either party;

(d) the matters referred to in sub-section 75(2) so far as they are relevant; and

(e) any other order made under this Act affecting a party.

The most striking fact about these provisions is the absence of any reference to misconduct. Against the background of the previous law, the omission seems deliberate.[24] However, unlike some United States legislation, the Act does not specifically *exclude* misconduct.[25] It might be thought that considerations of misconduct are implicit in some of the provisions, notably sections 75(2)(o), 79(2) and (4). References to "the justice of the case", or "just and equitable" could be regarded as requiring the court to have regard to some forms of misconduct. Not surprisingly, the issue was soon canvassed in decisions under the Act.

The cases fall naturally into two groups. In the first, the courts are concerned with a particular concept of misconduct, namely responsibilities for the marriage breakdown. In the second, various other types of misconduct are involved.

1. *Misconduct as Responsibility for the Marriage Breakdown*

In the early decisions, most judges rejected arguments that misconduct should be relevant.[26] With varying emphasis they stated that the basic philosophy of the Act, especially the new non-fault ground of divorce, precluded continued reliance on misconduct in financial matters. Some decisions, however, notably *In the Marriage of Issom*[27] and *Gates* v. *Gates*[28] held that misconduct had a limited role to play. *Issom* held that it may be taken into account in maintenance proceedings by virtue of section 75(2)(o) provided it is "obvious and gross". *Gates* denied that it was relevant to maintenance claims, but held that it *was* relevant to property applications under section 79.

Guidance was not long in coming from the Full Court, although the differently constituted Full Courts which considered the matter did not speak entirely with one voice. In *In the Marriage of Brown*[29] the Full Court allowed an appeal from a maintenance decision influenced by considerations of misconduct, and cited an earlier judgment of Wood J. in *In the Marriage of Petterd*[30] with approval. However, the decision was not conclusive because the appeal was allowed on the basis that the trial judge had attached *too much* weight to fault, implying that it might be permissible to attach *some* weight to it. *In the Marriage of Wells*[31] was a stronger judgment. There, on a section 79 application, the Full Court disagreed with

the views of Crockett J. in *Gates*[32], and held that the trial judge had been wrong in regarding it as relevant that the husband had deserted the wife:

> We cannot think that the Family Law Act would on the one hand endeavour to remove fault as a ground for dissolution of the marriage and re-introduce it as one of the factors to be considered on an application for a property settlement.[33]

A full consideration of the issue was undertaken in the cases of *In the Marriage of Soblusky*[34] and *In the Marriage of Ferguson*[35] which must be regarded as the leading cases. *Soblusky* involved a maintenance application. The husband claimed that during the marriage the wife had subjected him to a life of constant nagging, domination and physical violence. The magistrate accepted this evidence and, following *Wachtel* v. *Wachtel*[36] and other English decisions, held that the wife's conduct was "so obvious and gross that to make any order for maintenance against [the husband] would...[be] repugnant to justice".[37] Accordingly, the wife's maintenance application was dismissed. On appeal, Kelly J. held that the wife's conduct was not such as to entitle the magistrate to dismiss her claim; other factors, especially her needs, had not been given sufficient weight. His Honour therefore awarded $9 per week maintenance. The Full Court, however, allowed the husband's appeal, holding that he had no ability to pay, and on that ground restored the decision of the magistrate.

In discussing the relevance of misconduct, the Full Court undertook a detailed review of the authorities, English and Australian. The Honours stressed the omission of any explicit reference to misconduct in the Family Law Act, and said that in maintenance proceedings "the emphasis is clearly upon the twin elements of capacity and need".[38]

The Honours' conclusions on section 75(2)(o) are contained in six numbered paragraphs, which it is necessary to set out:

1. It is inappropriate and artificial to attempt to apply the Wachtel test to para. (o) of sec. 75(2).
2. The paragraph is couched widely and should maintain its flexibility of interpretation within proper limits. The discretion imposed upon the Judge under this paragraph must be exercised judicially having regard to the facts of the particular case and it is undesirable for the Court to fetter this discretion by artificially restricting the scope of that discretion;...
3. Facts or circumstances within sec. 75(2)(o) do not include facts or circumstances relating to the marital history as such of the parties but relate only as to facts or circumstances of a broadly financial nature.
4. It was argued that if such an interpretation were adopted cases would occur where the conduct of the applicant for maintenance was such that to make an order would be "an outrage to justice" or "offend commonsense". We consider that most of such cases of this type as can be postulated would be adequately covered under the existing provisions of sec. 72 and 75, without giving para. (o) a wider interpretation than is justified in the circumstances.
5. Having regard to the clear directions[39] contained in sec. 43 the Court may consider in an appropriate case that a matter falling within the ambit of

sec. 43 may be a "fact or circumstance" proper for the Court to take into account within the meaning of sec. 75(2)(o), but such cases would be rare and exceptional.

6. Save to the very limited extent referred to above, in proceedings for maintenance evidence relating to the marital conduct of the parties is irrelevant and inadmissible. . .[40]

Although the tenor of the judgment as a whole is strongly against misconduct being relevant, there is a curious ambiguity, and perhaps some inconsistency, about these conclusions. Paragraph 3 appears to do precisely what paragraph 2 forbids, because it restricts the scope of the discretion under paragraph (o). More important, the firm conclusion expressed in paragraphs 3 and 6 are determined to an uncertain extent by paragraphs 4 and 5. Paragraph 4 implies that there are *some* cases where the applicant's conduct would be relevant, namely where to make an order for maintenance would be "an outrage to justice" or "offends commonsense". The court appears to have substituted these phrases for the English phrase "obvious and gross" on the assumption that they refer to an even narrower category of fault, although (as will be argued later) it is doubtful if any such phrases can give intelligible guidance to practitioners wondering what to put in their affidavits. Again, paragraph 5 indicates that by reference to section 43 certain matters might be relevant. This really is an invitation to chaos, for the guidelines in section 43 are so remote from the practicalities of maintenance that they could be used to justify almost any order. The indication that such cases will be "rare and exceptional" does not help judges and practitioners identify them.

Applying these principles to the facts, the Court held that the marital history of the parties in this case was "clearly irrelevant" and evidence of it should not have been admitted.[41]

The conclusion on the facts, taken with the tenor of the judgment as a whole, is strongly against the relevance of fault, and it is perhaps to be expected that practitioners and judges will routinely say that fault is irrelevant to maintenance. But the obscurity of the numbered paragraphs causes a nagging doubt, and is a constant temptation, in an otherwise unfavourable case, for practitioners to give fault another try. The doubt is underlined by the failure of the court to indicate which of the cases reviewed were wrongly decided. *Issom*[42] (to be discussed later) is a case in point, for Fogarty J. used the phrases "outrage" and "offend commonsense", and these appear in paragraph 4, perhaps implying approval of the decision. If *Issom* is correct,[43] then it seems that it is an outrage to award maintenance to a woman who leaves her husband and becomes pregnant to an army officer, but not to award it to a woman whose abuse and violent conduct drove her husband out of the home (*Soblusky*). A careful analysis of *Soblusky,* therefore, shows that the court did not altogether succeed in removing from maintenance law the fundamental idea of *Wachtel,* that the court can take fault into account *if it is bad enough.*

In *Ferguson*[44] the Full Court considered what part, if any, fault should play in applications for property alterations under section 79. As has been noted, in *Gates*[45] Crockett J. had held that fault may be relevant under section 79, although not in maintenance proceedings. The Court rejected this view, holding that there was a

close relationship between the two sections, and that the principles in *Soblusky* also apply to property applications:

> The Family Law Act does not set out to punish parties on any basis when it comes to declaring their financial relationships either by way of ongoing maintenance or final property settlement.[46]

Ferguson is also helpful in that it distinguishes between responsibility for the marriage breakdown and other types of misconduct, such as destroying property of the parties. The latter distinction was neatly expressed in the opinion of Strauss J.:

> ...[F]aulty or guilty conduct which brings about the termination of the marriage relationship is not relevant to questions of maintenance unless in particular circumstances such conduct has economic or financial consequences other than those which merely flow from the breakdown of the marriage. This is so notwithstanding that such conduct might be categorised as gross and obvious, wilful, or calculated to destroy the marriage...[47]

All three judges in *Ferguson* pointed out that even where acts of misconduct are not relevant, their consequences may be.[48] This important point is illustrated in the cases discussed below.

Despite all this, the majority in *Ferguson* explicitly restated the qualifications to the non-fault doctrine that we noted in *Soblusky*. Watson and Wood S.JJ. stated that conduct causing the marriage breakdown is "usually" relevant only for its financial consequences, and continued:

> There may also be the rare or exceptional case where a party has ignored completely the basic concepts upon which the "partnership" of marriage is founded. For example, there may have been no contribution whatsoever, not even as a homemaker and parent. To this extent, and to this extent only, the principles set forth in s.43 may come into play.[49]

This affirms (but hardly clarifies) paragraphs 4 and 5 of *Soblusky*. In this respect, however, Strauss J. delivered a forceful dissenting view, holding that "section 43 does not provide any justification for taking into account matrimonial misconduct as such either under s.75(2)(o) or under s.79(2)".[50]

Until further appellate court decisions, the scope of the exception remains uncertain, and judges may be expected to follow the basic thrust of the *Soblusky/Ferguson* reasoning, that in financial matters it is not relevant which party can be blamed for the marriage breakdown. They would be entitled to do so, since the suggestions that fault might occasionally have some relevance are obiter dicta. No Full Court has ever held fault to be relevant, or unequivocally affirmed the correctness of a decision which did so.

There seems to be two reasons why some judges have thought that misconduct might be more relevant to property applications than to maintenance applications. First, section 79(2) requires the court to make an order if it is "just and equitable" to do so, and (unlike the maintenance provisions) section 79 does not explicitly limit the court to a consideration of the factors referred to in section 79(4).[51] On this point, however, *Ferguson*[52] and other decisions[53] appear to have determined that property matters are as much confined to the factors set out in the Act as are maintenance applications.

Secondly an important aspect of property cases is the contribution made by a party "by way of homemaker or parent" (section 79(4)(b)), and it might be thought

impossible to determine a contribution of this sort without determining questions of misconduct.

Assessing this kind of contribution may well involve the court in difficult value judgments: the case law has yet to come to grips with this issue. Some decisions since *Ferguson* have, however, considered how far allegations of misconduct can be brought within section 79(4)(b). It will be convenient in this connection to discuss the illuminating judgment in *In the Marriage of Sheedy*[54] although that decision properly belongs in the next section of this paper, since it was not argued that responsibility for the marriage breakdown was relevant.

In *Sheedy,* the wife argues that her contribution as a homemaker or parent was made more difficult because the husband had mistreated her. Nygh J. held that evidence of the alleged mistreatment should be disallowed. His Honour said that the result of *Soblusky* and *Ferguson* was that "the behaviour of the parties as against each other, is not per se, relevant to applications under sec. 74 or 79".[55] Under section 79(4) a failure to make a contribution as a homemaker or a parent

> is clearly relevant whether that failure is the result of fault or misfortune. Thus, it may be relevant that a wife has spent most of her time away from the matrimonial home or conversely that a husband was never there to assist her with the upbringing of the children. It is not, however, the question of fault which is per se relevant in such a situation. The absence may be caused by conduct which could be described as misbehaviour or it may be caused from accident which is outside anyone's control. . .[56]

Furthermore, section 79(4) refers to a contribution to the home and the children, not to the fulfilment of conjugal responsibilities, so that infidelity or ill-treatment of the other spouse is not, as such, a question to be considered. His Honour concluded:

> [t]o allege that as a result of maltreatment, the applicant's job as homemaker and parent was made more difficult, is in effect, to revive in a modified form old claims for compensation for matrimonial misconduct. If the *Family Law Act* has achieved anything, it is the end of that particular approach to the resolution of matrimonial disputes.[57]

2. *Other Kinds of Misconduct: Two Emerging Principles*

In several cases, the courts have considered whether some form of misconduct other than that causing the marriage breakdown is relevant. It must be remembered that in all these cases the court's power is highly discretionary, and it is wrong to suggest that any formula will be rigidly applied. With that caveat, it does seem that most of these cases embody intelligible general principles. These may be stated as follows:

(a) A party who unreasonably reduces the value of the property the subject of financial proceedings will thereby be disadvantaged.

In *In the Marriage of Cordell*[58] the wife removed furniture and damaged the matrimonial home after the parties had separated. Wood J. held that this conduct "should be taken into account against that party in determining whether it is just and equitable that an order should be made under section 79". His Honour based this conclusion on section 79(2), apparently on the basis that the reference to "just and equitable" in that sub-section gives the court a discretion wider than indicated in the criteria laid down in section 79(4), and (by incorporation) section 75(2).

Although subsequent authority is against this reasoning,[59] it is submitted that the decision is correct and could have been based on section 75(2)(o). It is a clear case of what was referred to in *Soblusky* as "conduct having financial consequences". This approach is affirmed in *In the Marriage of Antmann*,[60] where the husband had closed up the family trading company "in a fit of pique", resulting in losses through deterioration of the stock. The Full Court held that he should bear the burden of the loss. "The fact that a party has committed 'waste' of the matrimonial assets may be a relevant fact or circumstance under para (o) of sec. 75(2)."[61]

In *In the Marriage of Kutcher*[62], Murray J. held that the husband had incurred certain liabilities in his business ventures "unnecessarily", and the liabilities could not be taken into account in his favour in determining what was just and equitable in the way of property settlement or an order for maintenance. In *Meyerthal* v. *Meyerthal*[63] the husband allowed a house to fall into disrepair. In determining what interest the wife should have, Allen C.J. took into account the appreciation to the value of the house which *would have* occurred had the husband kept it in reasonable condition.[64]

(b) A party who unreasonably weakens his or her financial position may not take advantage of that fact in financial proceedings.

This is a convenient place to discuss the difficult decision in *Issom.*[65] There, the husband was an officer in the Royal Air Force. He had ten postings in different parts of the world during the twelve years of the marriage. He had "carried on some three affairs with other women, the first of these being of short duration and the other two being more substantial". In 1975, after the wife and three children had accompanied him to a posting in Kashmir, the marriage broke down. The wife formed a close relationship with a Captain Ericsson, a Finnish military officer also stationed in Kashmir, and told her husband that she intended to leave him and live with Ericsson, and eventually marry him. However, the husband "effectively prevented" her from leaving, and the family returned to Australia; the wife had agreed to assist him until he was able to obtain a housekeeper. Later in 1975 the wife went to Finland to live with Ericsson and became pregnant to him. However, she "began to increasingly miss her children" and returned to Australia after a few months, and sought their custody. She expected Ericsson to join her in Australia, but the judge doubted that this would happen. She had received no financial support from Ericsson, and had apparently asked for none; and it would be in practice impossible for her to obtain maintenance against him for the child while he was in Finland. The wife applied for maintenance from her husband. There was no doubt about her inability to support herself or the husband's ability to pay. Applying the test laid down in the English decision in *Wachtel*,[66] Fogarty J. held that her misconduct was "obvious and gross" and could be taken into account under section 75(2)(o). Her application was dismissed.

This decision was set out at length in *Soblusky*,[67] but the Full Court neglected to say whether it was correct. It is clear, however, that insofar as the reasoning relies on the *Wachtel* test it is no longer good law.

In *Ferguson*,[68] *Issom* was referred to with apparent approval by Strauss J., in the course of a judgment firmly excluding fault from property matters. His Honour said

of *Issom:* "[T]here may be cases, in which conduct by the claimant, affecting adversely that claimant's earning capacity, may be a fact or circumstance within the meaning of sec. 75(2)(o)".[69]

This analysis would explain *Issom* as an application of the suggested principle. It is doubtful, however, whether it should have been applied to the facts of that case. What was unreasonable conduct that weakened the wife's financial position?[70] If it was the act of leaving the husband for another man, then the exception would swallow up the rule, for any spouse who left the other would face a similar difficulty in seeking maintenance or property adjustment. This is why in *Ferguson* Strauss J. was careful to refer to financial consequences "other than those which merely flow from the breakdown of the marriage". Was it, then, the wife's becoming pregnant? The judge did describe this as "an incredibly stupid and absurd piece of conduct on her part".[71] But what evidence could justify such a finding? If the pregnancy had resulted from the wife's reliance on the partner's assurance that he had had a vasectomy, could her behaviour then be held to be "stupid and absurd"? Would the finding be justified if it could be shown that the wife should have used, or was reckless in her use of, contraceptives? Such a conclusion would require the court to determine whether in all the circumstances it was reasonable for her to use one form of contraception rather than another, or to assume that her partner would take the responsibility for avoiding the risk of pregnancy. Needless to say, there was no such evidence in *Issom*, nor can one easily imagine a court inquiring into such details. Was it, finally, the wife's act of forming a relationship with a man who was able to support her but did not do so?

This, in fact, appears to be the basis of the decision in *Patterson* v. *Patterson*[72], in which the husband was living with a woman who was not contributing to the rent of the accommodation, although she was in employment. Wood J. took the woman's capacity to pay into account when considering the wife's claim for maintenance. Noting that section 75(2)(m) directed the court to have regard to the financial circumstances of any cohabitation by the person seeking maintenance, Wood J. held that conversely section 75(2)(o) enables the court to consider the financial circumstances of the other party's cohabitation. He said, "the husband is entitled to require that she make some contribution...If he does not do so, that is his business".[73] The woman's earnings were therefore taken into account to the extent of half the husband's rent. The rationale appears to be that the husband, by declining to obtain any contribution from his current partner, was unreasonably reducing his ability to pay maintenance to his former wife, and should not be allowed to take advantage of that fact.

The principle under discussion seems both fair and necessary. A male model who lay about all day eating chocolates could hardly claim maintenance from his wife because he was now too fat to get a job, even though he had "needs" and she had the capacity to pay. In practice, however, to apply the principle in family situations may require the court to make very difficult evaluations of the reasonableness of conduct. The problem may be illustrated by considering a maintenance application by a wife who left her husband and became financially dependent for one of the following reasons:

(i) she preferred to live on her own, in idleness;

(ii) she preferred to live with a man who was rich but who refused to support her in any way;
(iii) she preferred to live with a man who was poor and had the care of his three small children;
(iv) she wanted to escape from physical violence by her husband;
(v) she wanted to remain a full-time mother to her two secondary school age children, rather than take available work for which she was qualified;
(vi) she wanted to devote herself to the full-time care of a handicapped relative.

These simple instances raise issues that are remarkably complex. The wife's behaviour would no doubt be held unreasonable in (i). If *Patterson* is correct, the wife in (ii) would also be prejudiced in her application, at least if she failed to seek financial support from her partner. Yet a court might take a more favourable view of the wife in (iii).[74] This might involve a policy position which could be stated as follows: while the law should not encourage exploitative relationships, as (ii) appears to be, it should not deny poor people the right to form family relationships. A sense of revulsion from physical violence might suggest that the wife's conduct in (iv) could not be held "unreasonable", but if the violence was occasional and slight, opinions might begin to differ. Again, in (v) and (vi) the wife's actions may be seen by some as eccentric, by others as reasonable, and by still others as her moral duty. In short, to describe a spouse's behaviour as "unreasonable" in the context of the principle under consideration involves both difficult value judgments about how people should behave, and often subtle policy issues about the role of family law.[75]

While no simple solution to this problem is apparent, one principle may be suggested as being consistent with the basic objectives of modern family law. This is, that adults should in general be free to choose their own family arrangements, subject of course to protecting children against harm. This principle appears to be infringed where the court holds that forming a new relationship is in itself conduct unreasonably weakening one's financial position. The correct approach on the facts in *Issom*,[76] we suggest, is that the court should not regard Mrs Issom's needs as arising out of any supposed "misconduct" or unreasonable behaviour. It should simply treat her as a separated spouse who has economic needs which happen to arise from her pregnancy. Her claim would be neither stronger nor weaker had she become pregnant as a result of rape, or had her economic needs arisen from illness or injury.

It may be said that this result seems wrong; is it fair that Mr Issom should, in effect, pay for someone else's child? The first response to this is that in law the child's father can be required to pay maintenance. Had Mrs Issom failed to take appropriate measures to obtain financial support from the father, *this failure* might properly be regarded as unreasonably weakening her financial position, and would therefore reduce the amount of maintenance payable by her husband. Could Mr Issom argue further that since the wife's present needs had nothing to do with the marriage, he should not be responsible for them? This argument depends on the assumption that the objective of maintenance is to provide support for those needs which arise out of the marriage. This is certainly one purpose of maintenance: thus the Court is required under section 75(2) of the Act to have regard to arrangements

for the care of children of the marriage,[77] and to the duration of the marriage and the extent to which it has affected the earning capacity of the person claiming maintenance.[78] However maintenance law also includes some needs which have nothing to do with the marriage; thus the Family Court is directed to have regard, for example, to the state of health of the parties,[79] and their capacity for appropriate gainful employment,[80] although these matters may be quite unrelated to the marriage.

It follows that Mr Issom should not have been able to resist his wife's claim for maintenance either by arguing that her needs arose from her misconduct, or that they did not arise out of the marriage. In view of the finding of the judge on the ability of Mr Issom to pay and the needs of Mrs Issom we submit that the outright rejection of her claim was wrong. This does not mean, however, that Mr Issom should have been ordered to support his wife indefinitely. The question of the proper extent of his liability raises what is perhaps the most fundamental issue of maintenance law, namely the respective roles of former spouses and the State in supporting financially dependent persons.

The issue is discussed later. At present, it is sufficient to point out that the provisions of the Family Law Act, while touching on the question, do not embody a definite policy. The court is directed to take into account the entitlement of any person to social services,[81] to end financial relationships between the parties as far as possible,[82] and to use maintenance to help a spouse become self-supporting.[83] All of these indicate a reluctance to impose long-term support obligations at the end of a marriage. On the other hand, the court must also take into account the age and health of the parties,[84] their responsibilities for other persons, [85] and a standard of living that is in all the circumstances reasonable.[86] These factors suggest in certain situations, a substantial obligation to provide continuing support. Until a clear policy is developed in this area, it will be impossible to say what is a "correct" result in cases like *Issom*, or to settle the precise scope of the principle under discussion.

3. *Other Kinds of Misconduct: Miscellaneous Cases*

In several decisions at first instance, the Family Court has considered the relevance of notions of "misconduct", other than that which brought about the marriage breakdown, to financial adjustment.

The first group of cases show a firm rejection of misconduct. In *In the Marriage of Grabar*,[87] a magistrate had discharged a maintenance order because the wife had been living with another man. Asche J. allowed the appeal. There was no evidence to suggest that the wife received any financial support from the man, and this was the only possible relevance of cohabitation: section 75(2)(m) refers to the "financial circumstances of the cohabitation". It was improper to rely on paragraph (o) to express displeasure at a wife's giving false evidence or at the wife's adultery. In *In the Marriage of Hack*,[88] the wife had become a quadriplegic as a result of an "incident" between the parties. Bell J. ruled that the manner in which she became a quadriplegic was not relevant to maintenance or property proceedings, and evidence of it (for example, whether the husband had been negligent or had deliberately injured the wife) should not be admitted. In *Sheedy*,[89] discussed earlier, Nygh J. refused to admit evidence tending to show that a party's contribution as a parent or

homemaker (section 79(4)(b)) was made more difficult because of the other party's misconduct.

In the second group of cases, decisions which could have been based on fault turn out, on a careful reading, to be normal applications of the other criteria stated in the Act, although in two of them[90] the court suggests that misconduct has some relevance.

In *In the Marriage of Groutsch*[91], Murray J. considered an application under section 79 by a wife who, it was found, left the home through genuine fear of the husband. This might imply that had the wife left for a less commendable reason, the result might have been less favourable. However, the case is not to be so understood. Referring to the incident which gave rise to the wife's fear, Murray J. said "Wherever the truth lies, the wife left the husband in October 1974 and as a result she thereafter had to provide accommodation for herself and the four children".[92] Elsewhere, Her Honour states "One thing is certain — no party should be punished financially on account of conduct".[93]

In *Barkley* v. *Barkley*,[94] the husband had assaulted the wife, causing loss of hearing. Carmichael J. said

> the Court should not look at the marital conduct of the parties in coming to a decision as to what property distribution is just and equitable between them. It does not follow that financial consequences of some conduct of one spouse to the other is not to be considered.[95]

His Honour therefore considered the wife's hearing loss as relevant to her capacity for employment (section 75(2)(b)) and her state of health (section 75(2)(a)).

In the Marriage of Steinmetz[96] involved a situation that has given rise to difficulty in other contexts. The parties were orthodox Jews, and the husband, described by Hogan J. as "a vindictive person with little mercy", refused to obtain a religious divorce (*gett*) with the result that the wife could not re-marry. His Honour held that this was relevant because it related to the wife's financial resources, since she would otherwise have the expectation of re-marriage and financial support from her second husband. His Honour also held, without discussing the matter, that it was relevant under section 75(2)(o). The same issue had arisen in the case of *Brett* v. *Brett*,[97] where the English Court of Appeal held that the refusal of the husband to grant the religious divorce was relevant to the financial resources of the wife but the Court added that financial adjustment was not to be used as a punishment. It is submitted that the refusal of the husband to grant the religious divorce is relevant *only* if it affects the financial position of the wife.[98] So understood, the case is not based on the husband's "misconduct" but is an ordinary application of the financial considerations listed in section 75(2).

In the Marriage of Perry[99] was an application by the wife under section 79. The husband, who had "severe psychiatric and/or psychological problems" appeared in person but refused to participate actively in the proceedings. He had persistently refused to obey previous court orders for which he had received a prison sentence for contempt. Baker J. held that in the circumstances it was important to make orders which "cut the painter between the parties in an economic sense so as to remove the need on the part of the wife to have any contact with the husband in relation to economic matters".[100] This appears to be an impeccable application of

the general criteria of the Act on financial and property matters.[101] It is therefore difficult to understand certain other pasages in the judgment. His Honour said that the husband's conduct was taken into account under section 75(2)(o), and was "an exception to the principles laid down in *Ferguson's case*"[102]. However, it is not clear to what extent Baker J. did in fact take the husband's conduct into account, since the judgment focussed on the needs of the wife and children and the resources of the parties.

These cases have yet to be considered by the Full Court. Of the first instance decisions, most show a firm resolve to exclude considerations of misconduct from financial adjustment. Although in *Perry* and *Steinmetz* the judgments give some attention to misconduct, the actual decisions do not depend on it, and the reasoning does not attempt to analyse the issues or the case law.

It follows that the weight of authority in the Family Court denies that notions of misconduct have any place in financial matters except if they fall within the two principles discussed earlier.[103]

IV. PROBLEMS IN A CONDUCT-BASED SYSTEM

1. *What is "Misconduct"?*

There is a preliminary difficulty in saying just what constitutes "misconduct" in a system of non-fault divorce. The "matrimonial offences" which formerly constituted the grounds for divorce also provided a framework for identifying the legal obligations of married persons. A spouse had a "legal obligation" not to commit adultery or desert the other spouse, in the sense that if he or she did so the other spouse would be entitled to a divorce. However where the only ground for divorce is irretrievable breakdown of the marriage, this framework collapses.[104] Adultery, desertion and other "matrimonial offences" cease to have any special legal significance. The law now provides no code of behaviour for married persons; the obligations of spouses can only be spoken of in a very limited sense. Notably, the spouses have obligations to maintain their children and each other in the circumstances specified in the law (that is sections 72, 75(2) etc.).[105]

It follows that married people might now legitimately establish a relationship which is mutually satisfactory to them, yet involves what would formerly have been matrimonial offences. An example would be a marriage in which the parties encourage each other to have sexual relations with other people. In fact, in modern western societies such as Australia, there is considerable diversity of values and practices relating to family life. The adoption of a non-fault system of divorce necessarily casts the courts in a different (and less judgmental) role than formerly. This has been recognised by judges in family law cases.[106] Gray writes that

> The abnegation of any moral tutelage vested in the matrimonial courts is an important characteristic of the relationship between citizen and the state in the Western democratic context.[107]

It is therefore difficult to know to what standards judges refer when they say, as they occasionally still do, that a party had a "lack of understanding of the obligations of marriage".[108] In the absence of any legally recognised set of marriage obligations such comments, and findings of "fault" or "misconduct" generally,

can only mean *conduct of which the judge disapproves.* Judicial opinion might differ as to whether, for example, a wife is justified in leaving her husband if, contrary to her understanding when they married, he is unable to father children, or if he unexpectedly joins the navy and wishes to spend most of their married life at sea.

Sometimes, judges do not speak of fault or misconduct as such, but say that one party was responsible for the breakdown of the marriage. Although this appears to be less a matter of personal values, its objectivity is largely illusory. The judge may choose from an unlimited number of possible "causes", and say, for example, that the real cause of the breakdown was (i) Y's decision to leave X, or (ii) X's persistent nagging, or (iii) Y's weakness in submitting to the nagging... extending to (xlv) Y's decision to get married rather than have an abortion, or (xlvi) X's clumsiness in using contraceptives. Thus the personal values of the judge are involved in identifying where responsibility for the breakdown lies.

The present point is that there is no special code of behaviour for married people *as such.* Clearly, married people are bound by the ordinary laws of crime, contract, tort and so on. For example, forms of "misconduct" such as assault may attract criminal or civil sanctions. The issue, however, is whether, in addition to this body of law, the law of financial adjustment should be used to regulate the behaviour of the parties. However, in contrast with these other areas of law which prescribe the kind of conduct which will attract liability, there is no such guide in relation to financial adjustment. It is therefore misleading to pose the issue as being whether some factual item called "misconduct" or "fault" should be relevant. The issue is whether financial adjudications should or should not express the opinion of the judge with regard to how the parties should have behaved.

2. *Misconduct in Practice — the English Experience*

In England, although divorce is based on the ground of "irretrievable breakdown of marriage", the legislation specifically directs the courts to have regard to conduct of the parties in financial adjudications.[109] Stephen Cretney clearly explains the difficulties this creates:[110]

> Under the... old law, the question whether one party was or was not guilty of a specified matrimonial offence was narrow and defined. Under the new law, it seemed, the court had... to ascertain who was responsible for the breakdown of the marriage. This would necessarily involve a wide-ranging investigation of the parties' conduct: every item of conjugal unkindness which could be dragged out of the memory would have to be embodied in an affidavit ... In *Griffiths* v. *Griffiths*[111] for example, the pleadings occupied 66 pages, the hearing lasted more than a month, and the judge's findings occupied 66 pages of transcript. Possibly the worst feature of this emerging trend was that the issues on which such a formidable amount of time and money... were expended were almost wholly unjusticiable:
>
> > "...the forensic process is reasonably well adapted to determining in broad terms the share of responsibility of each party for an accident on the road or at work because the issues are relatively confined in scope, but it is much too clumsy a tool for dissecting the complex inter-actions which go on all the time in a family. Shares in responsibility for breakdown cannot

> properly be assessed without a meticulous examination and understanding of the characters and personalities of the spouses concerned. . . "[112]

The English case law shows that one consequence of these problems is considerable uncertainty, which has persisted despite the Court of Appeal's ruling in *Wachtel* that misconduct is relevant only when "obvious and gross". M. D. A. Freeman has described some of the decisions as follows:[113]

> What is "obvious and gross misconduct" varies with the values of the individual judge or registrar. In *Harnett* v. *Harnett*[114] Bagnall J. was not prepared to characterize as "gross and obvious" the behaviour of a wife who had an affair with a youth half her age whilst her husband was recovering from an operation. In *Dixon* v. *Dixon*[115] on the other hand, a husband's adultery with his daughter-in-law was held to be so "obvious and gross" to justify the award of a larger sum than a one-third share to his wife. In *Cuzner* v. *Underdown*[116] the conduct of a wife in taking a half-share in a house acquired whilst she was committing adultery was said to be "obvious and gross" misconduct and, even allowing for the fact that she had brought up the children and that a portion of her earnings had been used towards the purchase of the previous matrimonial home, it was not just that she should have a share in it, particularly as she was entirely responsible for the breakdown of the marriage. In *Armstrong* v. *Armstrong*,[117] the conduct of a wife in firing a shotgun through the keyhole at her husband was conduct that the court took into account: she was given only one-quarter of the proceeds of sale of the family assets. Adultery, it seems, is still sometimes regarded with greater repugnance than attempted murder: Mrs Cuzner got nothing for her misconduct; Mrs Armstrong forfeited one-twelfth of what she might have expected. In *Griffiths* v. *Griffiths*,[118] the court paid no attention to the fact that the husband had been "callously unkind" and brutal towards his wife but in *Perry* v. *Perry*[119] the wife's "bad temper" was held to be "obvious and gross misconduct".

It is not difficult to predict a decision by reference to earlier decisions; the cases show that different judges can make very different assessments of the same facts.[120] It will be recalled that in *Soblusky* the magistrate had found that the conduct of the wife was "so obvious and gross that to make any order for maintenance. . . would not only be inadequate; but, also repugnant to justice".[122] However, on appeal the Full Court held that the conduct did not fall within the category of "gross and obvious" and was irrelevant.[123] Moreover, as the extract from Freeman illustrates, there is a further level of uncertainty when it comes to translating the "misconduct" into money terms.

The application of notions of misconduct to financial adjustments also seems to threaten the objectives of the non-fault ground of divorce, namely "When, regrettably, a marriage has. . . broken down, to enable the empty. . . shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation".[124] The old fault-based grounds failed to do this: "The insistence on guilt and innocence tends to embitter relationships, with particularly damaging results to the children, rather than to promote future harmony".[125] These objectives require that in the resolution of financial disputes, as much as in the granting of the divorce, claims and counter-claims of general misconduct should be avoided.

It was, in fact, a recognition of these problems that led the English Court of Appeal in *Wachtel*[126] to hold that misconduct should only be taken into account if it was "gross and obvious". This was a bold reading of a statute which referred to the "conduct" of the parties in general terms, and at least one judge thought that it was too narrow.[127] No doubt it was hoped that the phrase would remove allegations of misconduct from at least the majority of cases. It has, however, met with only limited success. In *Griffiths*[128] the Court of Appeal deplored the making of allegations of misconduct since they were unnecessary, although parties refrain from making them at their peril. In *Cuzner* v. *Underdown*,[129] for example, the Court of Appeal ordered the wife to transfer her half share in the matrimonial home to her husband, because of findings about her misconduct, and the fact that no allegations had been made against the husband. Yet, as the other cases cited by Freeman illustrate, the formula fails to ensure a consistent approach in assessing the allegations of misconduct which are made.

In our view, therefore, it is no solution to the problem to say that misconduct is relevant only when it is very serious. There seems little difference whether the formula adopted is "gross and obvious", or "an outrage to justice" or some other phrase. It should be added that the compromise embodied in the *Wachtel* formula is at best a pragmatic one, for if some notion of justice does require that serious "misconduct" should be taken into account, then it would also require that less serious misconduct should be taken into account to a lesser extent.

V. JUSTICE, MISCONDUCT AND THE OBJECTIVES OF THE LAW

The previous section argued that to apply notions of misconduct to financial adjustments presents major theoretical and practical difficulties. It might be thought, nevertheless, that a just result requires a conduct-based approach: if so, law reformers would have to balance the disadvantages outlined earlier against the greater justice of such an approach. In this section we suggest that there is no need to make such a choice, for the assumed link between justice and misconduct is illusory: *even in principle* misconduct should not be taken into account. This argument requires a consideration of the objectives of the law in this area.

When courts have taken misconduct into account, they have often expressed themselves forcefully in terms of a sense of justice. An example is the description by Sir George Baker P. in *W* v. *W* of

> conduct...of the kind that would cause the ordinary mortal to throw up his [sic] hands and say, "Surely, that woman is not going to be given any money".

It was suggested above[131] that such application of the intuitive sense of morality or propriety of the court may be traced to the ecclesiastical courts, which felt it their duty to enforce the moral code embodied in religious doctrine, and held, for example, that a "guilty" wife would not receive financial support, but would be "fed with the bread of affliction and the water of adversity".[132]

The family courts of today are in a very different position. They work in a diverse community in which many values formerly taken for granted are the subject of difference and debate. Conjuring up images of outraged "ordinary mortals" is no substitute for a careful analysis of the nature of the decisions to be made. Their task

is not to enforce morality as such, but to apply the law. They should not shrink from the value judgments the law requires them to make, but these judgments should be related to the principles and objectives of the particular area of law concerned.

Occasionally, judges have attempted to explain why they take account of misconduct. One such attempt is offered by Sir George Baker in *H* v. *H*,[133] in which the wife had left, after 15 years marriage, to live with another man. She had claimed a third of the former matrimonial home, but was awarded one twelfth:

> If the concept of earning is to be applied to a domestic situation, then it should be applied with all its normal consequences. One is that if the job is unfinished you do not earn as much. A builder agrees to build four houses. He goes off to a job which he prefers to do, leaving them in varying stages of completion. Leaving aside any question of special contractual terms, the best he could hope to receive is the value of work actually done, remembering also that the owner has to have the work completed. Is there any difference between four houses and four children? I think not.[134]

This startling analogy calls for comment on a number of counts, but here only the underlying reliance on *contract* as the rationale for adjustment of financial claims will be considered. For several reasons this rationale is unsatisfactory. First, marriage today does not involve a promise by the wife to do the "job" of raising the children. The law is neutral on the division of labour between spouses, and under a non-fault system of divorce, neither party can be said to give a legally enforceable promise to stay with their spouse. More generally, marriage is more of a venture into the unknown than a contract with precise terms. It is almost always a matter of continual adjustment and readjustment as the family moves through its various stages. It is quite inappropriate in resolving financial issues, often years later, to hold the parties to some notional contract made at the time of the marriage. Secondly, the policy of family law is more complex than that of building contracts. Contract law seeks to ensure that promises are kept and reasonable commercial expectations thereby satisfied. In contrast, modern family law by no means seeks to hold unhappy spouses together under financial threats, for it is recognised that the happiness of the children and adults concerned, and the public interest will normally be served by allowing them to form new and hopefully more satisfying relationships.

A second and historically more important rationalisation assumes that marriage involves a lifelong commitment to mutual economic support. It follows, on this view, that financial adjustment should be designed so far as possible to place the parties in the position they would have been in had they remained married. The view has been called the principle of "minimum or minimal loss",[135] because it casts on the court the task of making orders which will minimise the loss caused to the economically weaker party by the marriage breakdown; the "loss" being the difference between the actual situation and the expected situation of a life-long marriage. This principle was a cornerstone[136] of many early judicial decisions in England and Australia. It receives explicit recognition in England, where the relevant statutory provision[137] directs the court (*inter alia*):

> to place the parties, so far as it is practicable and having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

The principle of minimum loss appears to be closely linked with the continued emphasis on misconduct in English law. The argument is that if the marriage ended because the wife left the husband without justification she cannot fairly expect to be compensated for what she has, as it were, voluntarily given up. The link is made explicit by the Ruddock Committee which proposed that the court should consider a party's "reasonable expectations" (another version of the minimum loss principle), and said

> This would direct the court to consider the case of a middle aged woman who is left without a husband when she had looked forward to remaining essentially a housewife for the remainder of her life. It might be relevant to consider whether the loss of that expectation was due to her fault or his.[138]

The argument makes two assumptions which we would reject. The first is that the courts can formulate and satisfactorily apply a notion of matrimonial misconduct (this was discussed in the previous section). The second is that the principle of minimum loss is a proper objective of the modern law of financial adjustment. We think it is not, for the following reasons.

Reported cases show that application of the principle leads to results that are clearly unacceptable. For example, in *Brett* v. *Brett*[139] the wife was a solicitor and twenty three, capable of earning her own living, and the marriage had lasted effectively less than six months. There were no children. She divorced her wealthy husband on the grounds of his cruelty, and obtained a lump sum of 30,000 pounds plus annual maintenance of 2,000 pounds. Willmer L.J. stated that the marital obligation of the husband was, "of course, an obligation to maintain her on the scale appropriate to his station in life". Gray comments:

> It is quite remarkable in many ways that beliefs and mores which were essentially those of Victorian England should still cast so dark a shadow upon modern legislation.[140]

Similarly, the Scottish Law Commission considered such a result "absurd", but added shrewdly, "no doubt the courts would avoid it but they could do so only by ignoring the statutory objective".[141] This they have largely done. Thus Sir George Baker roundly declared in 1973 that "In these days of 'Women's Lib' there is no reason why a wife whose marriage has not lasted long, and who has no child, should have a 'bread-ticket' for life".[142] John Eekelaar, reviewing the case law in 1979, found that in practice the courts focussed mainly on the needs of children and needy spouses.[143]

The main reason that the English courts have been able to avoid the worst consequences of the minimum loss principle is that the legislation *also* directs them to have regard to other matters, especially the needs and resources of the parties.[144] These provisions, and similar criteria in the Family Law Act,[145] embody modern thinking about the proper objectives of this part of the law.

Recent legislation and comment, and the work of law reform bodies, has shown a remarkable degree of consensus on the proper functions of the modern law of financial adjustment.[146] It may be summarised as follows. The law involves two elements, in practice closely linked, namely the distribution of assets and the creation and enforcement of obligations of support. The traditional legal conceptions of entitlement to property, expressed in the rules of contract, trust, and

so on, do not operate fairly in the family context, for they focus mainly on questions of legal title and past financial contributions: they do not consider contributions to family life made by housekeeping and child care, nor do they take account of the parties' future needs. The modern law is based on a recognition that marriage is a form of partnership, in which the spouses work out their own division of labour. The ultimate distribution of the assets built up during the marriage should not depend on what that division of labour happened to be, but should recognise the essentially co-operative nature of the relationship. There are different views on how this objective should be implemented. On one view, the law should regard the parties as jointly owning the family assets ("matrimonial property" regimes); on another, the courts should make an assessment of the actual contributions of the parties (whether financial or non-financial) in each case.

Australian law is a good example of the latter view. The criteria for distribution of property emphasise the parties' contributions, both financial and as "homemaker and parent", and the courts have tended to say that in marriages of substantial duration, especially where there are children, an equal distribution is usually the fairest result.[147] Such criteria do not involve any consideration of lost expectations arising out of the marriage, and consequently, as has been seen, the court can apply them satisfactorily without relying on concepts of matrimonial misconduct.

As to the second element, that of support obligations, it seems generally accepted that the court should have power to make appropriate orders, based essentially on the parties' resources and needs. This approach is illustrated by the work of the Canadian Law Reform Commission,[148] which pointed out that the earlier basis of the husband's obligation to support his wife was the legal and economic dependence of married women. Maintenance obligations today, it argued, should be based not on marriage as such but from "arrangements made by married people that have...the effect of hampering the ability of a spouse to provide for himself or herself".[149] On this basis, the Commission formulated a principle of "reasonable needs" very similar to the Australian principle of inability to maintain oneself adequately.[150]

It is now well recognised that the re-allocation of assets and the creation of support obligations are usually parts of a single process of making a fair re-arrangement of the family resources. In short, it can be said that current thinking requires the court to make such a re-arrangement or adjustment having regard to (i) the parties' contributions, financial and otherwise, to the family fortunes, (ii) the present and anticipated needs of the parties, (iii) the present and anticipated resources of the parties, and (iv) the welfare of the children.

Of course, there is room for difference and debate about the precise scope of these principles, and the relative weight of the different factors. There is also a major and unresolved tension between the law of financial adjustment, and the assumption in a modern welfare state that the community should help those who cannot support themselves. The matter arises most sharply when a spouse has needs which arise independently of the marriage. Suppose the wife of a wealthy man is run over by a bus and seriously injured shortly after separation. Should the ex-husband support her, and if so for how long? Why is it that the law imposes support obligations upon a wealthy person who happens to be her husband, rather than a wealthy person who

happens to be her parent, or sibling, or child, or rather than upon the State's social security system? The proper balance between private and public obligations of support promises to be a key issue in the future development of this part of the law.[151]

It is not necessary for present purposes to pursue this topic. What emerges from this sketch is that modern conceptions of a proper financial adjustment leave no room for the principle of minimum loss. That principle reflects now obsolete conditions. On marriage, the wife gave up many of her legal rights, and control of most of her property; in return the husband undertook obligations of support which would be discharged only if the wife forfeited her rights by matrimonial misconduct of the kind specified by the law. There was a stigma associated with divorce; remarriage would be difficult, and alternative respectable careers were hard to find. Even a broken engagement carried a stigma, and the jilted woman had an action for damages for breach of promise of marriage. Today, all this has changed. There are no matrimonial offences. Husbands are under no general obligation to support their wives: depending on the financial situation, their wives may have to support them. For many divorced wives, remarriage is likely, and so is employment. The action for breach of promise of marriage has been abolished.[152] Of course, it is true that for many people divorce brings great sadness and stress, and perhaps women, especially when they are older, are hardest hit. But it is submitted that the Family Law Act and the Canadian Law Reform Commission are right in focussing on the notions of contributions to the family, reasonable needs and present resources as the basis for financial adjustment. While there is a need for further working out of these ideas, they form a more appropriate basis for the modern law than an attempt to compensate spouses for the loss of what they hoped the marriage might bring. Within the framework of needs, resources and contributions, there is little call for the courts to undertake the difficult and divisive task of allocating blame for the marriage breakdown.[153]

VI. CONCLUSIONS

1. *The Present Law*[154]

In determining maintenance and property applications under the Family Law Act, it is not relevant that one spouse was responsible for the breakdown of the marriage, or committed what was formerly regarded as a matrimonial offence. Evidence of these matters should therefore be inadmissible. There are Full Court dicta, variously expressed, of a limited class of exceptional cases where such conduct would be relevant. However, this exception, if it exists, appears to be so narrow that it will have little if any practical application.

Other forms of fault or misconduct are in general not relevant either, for it is not the intention of the Family Law Act to use financial orders for the purpose of rewarding or punishing the behaviour of married people. Economic facts relevant under the criteria specified in the Act are not, of course, rendered irrelevant because they may have occurred as a result of some form of misconduct.

Application of the criteria in the Act does however, require the court to have regard to certain types of conduct closely related to financial matters. The only such

types of conduct so far established by the case law are (a) conduct by a party unreasonably reducing the value of property of the parties or of either of them, and (b) conduct of a party which unreasonably weakens his or her financial position. The precise scope of (b) remains to be determined.

2. *The Recommendations of the Ruddock Committee*

The Ruddock Committee recommended that section 75(2)(o) should be amended to read as follows:

> Any fact or circumstance, including any conduct of the applicant for maintenance towards the respondent and relevant to the matrimonial relationship, which, in the opinion of the Court, the justice of the case requires to be taken into account.[155]

It will be noted that this recommendation would probably re-introduce misconduct in a *wider* sense than that adopted in England, although it is not clear whether this was intended, as the Committee appeared to agree with the reasoning in *Issom*[156] which followed the English authorities.

The report does not indicate that the Committee considered any of the arguments canvassed in this article, nor is there any reference to other studies such as the work of law reform commissions. The recommendation seems simply to be based on a misunderstanding of *Soblusky*.[157] The report states that *Soblusky* held that

> facts and circumstances within s.75(2)(o) do not include those relating to the marital history of the parties such as the wife's nagging, beating him up occasionally, refusing him permission to use the car, banking his salary and other income and at the time of his leaving the home, her prevailing on him to transfer his interest in it to her for the sum of $1,000.00.[158]

This is unfortunately quite misleading, since the financial consequences of the wife's conduct were taken into account in that case. The transfer of the husband's income and interest in the home were among the factors that led the Full Court to affirm the decision of the Magistrate to refuse any order in favour of the wife. The Full Court said in relation to the home that the magistrate

> was entitled and indeed required to take into account in determining what if any order to make by way of financial provision for the wife the fact that at the time of the final separation of the parties this property had been transferred by the husband to the wife for virtually no consideration at all.[159]

Nothing in the Ruddock Report, therefore, weakens the case advanced in this article.

3. *Should the Law be Changed?*

In our view the Family Law Court, (except in some stray dicta suggesting a wider role for misconduct), has rightly held that misconduct is irrelevant unless it unreasonably reduces the value of property or unreasonably affects a party's own needs or resources. The recommendations of the Ruddock Committee are ill-advised: "misconduct" should not be re-introduced into the Act as a factor relevant to financial adjustments. It does not lead to consistent or fair results, and it undermines one of the main objectives of modern family law, namely to promote future harmony, and reduce bitterness and humiliation when marriages break down. Moreover, notions of misconduct have no general relevance to the matters on which modern financial adjustments should focus, namely the needs, contributions and resources of the parties, and the welfare of any children.

FOOTNOTES

1. S.48.
2. *Family Law in Australia: A Report of the Joint Select Committee on the Family Law Act* (1980), Vol. 1, 42.
3. Somewhat similar issues arise in other contexts, such as the maintenance of children (*In the Marriage of Mercer* (1976) 1 Fam. L.R. 11, 179; *In the Marriage of Gamble* [1978] F.L.C. 90-452; *In the Marriage of Oliver* 4 Fam. L.R. 252), and in Testators' Family Maintenance.
4. This statement requires qualification in situations where the conduct itself has direct financial consequences: see the discussion of this issue below.
5. B. Baker, *The Matrimonial Jurisdiction of Registrars* (1977).
6. See generally, K. Gray, *Re-allocation of Property on Divorce* (1977); *Report of the Committee on One-Parent Families* (H.M.S.O. 1974, Cmnd 5629) (The Finer Report); J. L. Barton, "The Enforcement of Financial Provisions" in R. H. Graveson & R. R. Crane (eds), *A Century of Family Law* 1857-1957 (1957).
7. See generally, H. A. Finlay & A. Bissett-Johnson, *Family Law in Australia* (1972, 1st ed.) chapter 1; R. Sackville, "The Emerging Australian Law of Matrimonial Property" (1970) 7 *M.U.L.R.* 353.
8. For the law under this legislation see Finlay & Bissett-Johnson, *id.;* P. Toose, R. Watson & D. Benjafield, *Australian Divorce Law and Practice* (plus Cumulative Supplement) (1968); D. Hambly & J. N. Turner, *Cases and Materials on Australian Family Law* (1971); Sackville, *id.*
9. S.84 (emphasis added).
10. S.86.
11. (1967) 116 C.L.R. 366.
12. *Id.*, 376.
13. *Id.*, 379.
14. *Adams* v. *Adams* (1968) 11 F.L.R. 197, 200-201.
15. (1963) 4 F.L.R. 91.
16. *Id.*, 93-94 quoting *Geyer* v. *Geyer* (1949) 66 W.N. (N.S.W.) 105, 108 per Bonney J.
17. *Jones* v. *Jones* [1964] A.L.R. 998; *Blincko* v. *Blincko* (1964) 5 F.L.R. 40.
18. [1966] 2 N.S.W.R. 440.
19. *Id.*, 442 per Begg J.
20. (1970) 16 F.L.R. 248.
21. *Id.*, 258.
22. *Id.*, 257.
23. Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill* (1974) paras. 64-76. The Committee did propose what is now s.75(2)(o) (para. 67) but without discussion, except for an earlier reference to the need for a wider discretion and a concern that the original Bill might enable maintenance to be ordered for a spouse who is "in need" but "not properly entitled to expect to be maintained" (para. 65). The latter phrase is not explained.
24. See *In the Marriage of Ferguson* (1978) 4 Fam. L.R. 312, 319 per Strauss J.
25. Comment, (1978) 57 Nebraska L.R. 792.
26. *In the Marriage of Willett* (1976) 1 Fam. L.R. 11,242; *In the Marriage of Petterd* (1976) 1 Fam. L.R. 11,496; *In the Marriage of Zappacosta* (1976) 2 Fam. L.R. 11,214.
27. 1976, reported [1977] F.L.C. 90-238.
28. (1976) 1 Fam. L.R. 11,452.
29. [1976] F.L.C. 90-090.
30. Note 26 *supra.*
31. (1978-79) 4 Fam. L.R. 57.
32. Note 28 *supra.*
33. Note 31 *supra,* 61 per Watson S.J., Lusink & Gun J.J.
34. (1976) 2 Fam. L.R. 11,528.
35. (1978) 4 Fam. L.R. 312.
36. [1973] 2 W.L.R. 366.
37. Note 34 *supra,* 11,534.
38. *Id.*, 11,542.
39. S.43 provides, in part, that the Court shall have regard to the need to "preserve and protect the institution of marriage", and to "give the widest possible protection and assistance to the family as the natural and fundamental group unit of society".
40. Note 34 *supra,* 11,550.
41. *Id.*, 11,551.

42. Note 27 *supra.*
43. In *In the Marriage of Eliades* (1981) 6 Fam. L.R. 916 Nygh J. explicitly left the point open.
44. Note 35 *supra.*
45. Note 28 *supra.*
46. Note 35 *supra,* 329-330 per Watson & Wood S.JJ.
47. *Id.,* 318.
48. *Id.,* 328ff (per Watson & Wood S.JJ.), 319 (per Strauss J.).
49. *Id.,* 328.
50. Note 47 *supra.*
51. *Gates,* note 28 *supra; Burdon & Nikou* [1977] F.L.C. 90-239; *Cordell* (1977) 3 Fam. L.R. 11,588, 11,593f per Wood. J.
52. Note 35 *supra.*
53. *In the Marriage of Currie* (1976) 2 Fam. L.R. 11,307, 11,309; *In the Marriage of Wells* (1977) 4 Fam. L.R. 57, 58-59; *In the Marriage of Aroney* (1979) 5 Fam. L.R. 535, 538-540.
54. [1979] F.L.C. 90-719.
55. *Id.,* 25.
56. *Ibid.*
57. *Ibid.*
58. Note 51 *supra.*
59. Note 53 *supra.*
60. [1980] F.L.C. 90-908 (Full Court).
61. *Id.,* 75, 744.
62. [1978] F.L.C. 90-453.
63. (1977) 3 Fam. L.R. 11,182.
64. See also *In the Marriage of Szelley* [1977] F.L.C. 90-323; *In the Marriage of Sharp* [1978] F.L.C. 90-470.
65. Note 27 *supra.* See also M. Brown & S. Fowler. *Australian Family Law and Practice,* Vol. 1, 21, 343.
66. [1973] 2 W.L.R. 84 (Fam. D.), 366 (C.A.).
67. Note 34 *supra.*
68. Note 35 *supra.*
69. *Id.,* 319.
70. It seems to have been a combination of factors that most impressed Fogarty J.: "[N]ot only did she leave her husband and children to renew her association overseas with her lover but she has now returned pregnant to him and still maintains that she intends to marry him... To make an order which will require the husband to support a wife who has deliberately chosen to leave him in order to further an association with someone else who is pregnant to that person and who regards the marriage at an end [sic] and intends to marry somebody else appears to me to... fall within whatever test of 'conduct' one applies". Note 27 *supra,* 76, 292.
71. Note 27 *supra,* 76, 285.
72. [1979] F.L.C. 90-705. See also the judgment of Nygh J., *In the Marriage of Eliades* (1981) 6 Fam. L.R. 916.
73. [1979] F.L.C. 90-705, 78, 759.
74. *In the Marriage of Lutzke* (1979) 5 Fam. L.R. 553; *In the Marriage of Ostrofski* (1979) 5 Fam. L.R. 685; *In the Marriage of Baber* (1980) 6 Fam. L.R. 276; E. Goodman, "Maintenance: Which Family Comes First?" (1980) 5 *Legal Service Bulletin* 277.
75. A major problem is that there may be no social consensus on the value judgments at stake, especially where differences in ethnic or cultural backgrounds are evident. In such cases, appeals to what is thought by the "reasonable man" or "ordinary mortals" (see text to note 130 below) are illusory, observing the judge's choice of a particular set of values.
76. Note 27 *supra.*
77. S.75(2)(c).
78. S.75(2)(k).
79. S.75(2)(a).
80. S.75(2)(b).
81. S.75(2)(f).
82. S.81.
83. S.75(2)(h).
84. S.75(2)(a).
85. S.75(2)(e).
86. S.75(2)(g).

87. (1976) 2 Fam. L.R. 11,581.
88. 1977, reported (1980) 6 Fam. L.R. 425. The wife in such a case would have a remedy in tort law. The correct position, we suggest, is that any damages already received are to be taken into account as part of the wife's financial resources. If the damages claim is pending, the Family Court may have to estimate its worth, as it often has to estimate other resources which are difficult to quantify.
89. Note 54 *supra.*
90. *In the Marriage of Steinmetz* [1981] F.L.C. 90-079 (Full Court), and *In the Marriage of Perry* (1979) 5 Fam. L.R. 454. See also *In the Marriage of Fogarty* (1976) 2 Fam. L.R. 11,385, 11,394.
91. [1978] F.L.C. 90-461.
92. *Id.*, 77, 363.
93. *Id.*, 77, 362.
94. (1976) 1 Fam. L.R. 11,554.
95. *Id.*, 11,558.
96. Note 90 *supra.*
97. [1969] 1 W.L.R. 487.
98. Whether a lost opportunity of re-marriage should be regarded as a financial loss is perhaps questionable; now that the law is in sex neutral terms it is possible that the wife would come under a liability to pay maintenance if she married a poor man. In *In the Marriage of Woolley* (1981) 6 Fam. L.R. 577, Nygh J. held that it is not consonant with the Family Law Act to take into account the wife's prospect of re-marriage.
99. (1979) 5 Fam. L.R. 454.
100. *Id.*, 458.
101. S.81.
102. Note 99 *supra,* 459. Arguably, the decision is not a true exception to *Ferguson's case,* which considered conduct causing the marriage breakdown; this was not in question in *Perry.*
103. Particular difficulties arise where wealth is held in the form of trusts or family companies. In *In the Marriage of Tuck* [1981] F.L.C. 91-021, the Full Court refused to allow the husband to benefit from manipulating the assets to his advantage shortly before the marriage breakdown; it was held that "he acted in a manner which had a direct and adverse effect on the financial circumstances of the wife, a matter which can be taken into account under s.75(2)(o)" per Evatt C.J. and Murray J., 76, 220. In our view, such cases should not be seen as creating a new category of "misconduct" but as examples of the court carefully analysing what contributions the parties have in fact made. See also *In the Marriage of Abdullah* (1981) 6 Fam. L.R. 654.
104. It has continuing relevance, of course, to the extent that the law prescribes fault-based criteria for the assessment of the marriage breakdown. See S. Cretney, *Principles of Family Law* (3rd ed. 1979) 101ff.
105. The provisions of s.43 of The Family Law Act 1975 (Cth) are in general terms and do not appear to create marital obligations. The reluctance of the law to regulate the behaviour of married people, as such, towards each other is one example of the increasing tendency of the law to respond to the needs of persons in domestic relationships irrespective of their marital status. On the issues surrounding the place of de facto couples and other family units in the legal system see O. Jessep, *Background Paper on De Facto Relationships* (N.S.W. Law Reform Commission, 1981).
106. See *In the Marriage of Pavey* (1976) 1 Fam. L.R. 11,358 (divorce); *D.K.I.* v. *O.B.I.* (1979) 5 Fam. L.R. 223 (custody); *Kaljo* v. *Kaljo* (1974) 3 A.L.R. 130, 142ff.
107. Gray, note 6 *supra,* 206.
108. *In the Marriage of Doyle* (1980) 6 Fam. L.R. 14, 16 per Wood J.
109. Matrimonial Causes Act 1973 (Eng.), s.25(l).
110. Note 104 *supra,* 327-328.
111. [1974] 1 W.L.R. 1350.
112. *Wachtel* v. *Wachtel* [1973] 2 W.L.R. 84, 90 per Ormrod J.
113. M.D.A. Freeman, "Divorce Reform — Seven Years Later" (1979) 9 *Fam. Law* 3 (Pt. I), 40 (Pt. II), 42.
114. [1973] 3 W.L.R. 1.
115. (1975) 5 *Fam. Law* 58.
116. [1974] 1 W.L.R. 641.
117. (1974) 118 *S.J.* 579.
118. Note 111 *supra.*
119. Unrep. 1975, Bar Library Transcript No. 271.
120. See *eg., Harnett* v. *Harnett,* note 114 *supra; M* v. *M* (1976) 6 *Fam. Law* 243.
121. Note 34 *supra.*
122. *Id.*, 11,534.

123. *Id.*, 11,551.
124. The Law Commission, *Reform of the Grounds of Divorce — The Field of Choice* (H.M.S.O. 1966 Cmnd 3123) para. 15.
125 *Id.*, para. 28.
126. Note 66 *supra.*
127. Davies L.J. in *Rogers* v. *Rogers* [1974] 1 W.L.R. 709, 712.
128. Note 111 *supra.*
129. Note 116 *supra.*
130. [1975] 3 W.L.R. 752, 754.
131. Part II.
132. *Manby* v. *Scott* (1659) 1 Mod. Rep. 124; 86 E.R. 781.
133. [1975] 2 W.L.R. 124.
134. *Id.*, 131.
135. *Eg.* J. Eekelaar, "Some Principles of Financial and Property Adjustment on Divorce" (1979) 95 *L.Q.R.* 253; R. Bailey, "Principles of Property Distribution on Divorce — Compensation, Need or Community" (1980) 54 *A.L.J. 190; The Law Commission, Discussion Paper, The Financial Consequences of Divorce: The Basic Policy* (H.M.S.O. 1980).
136. In particular see *Davis* v. *Davis* [1964] V.R. 278; *Attwood* v. *Attwood* [1968] P. 591; *N* v. *N* (1928) 44 T.L.R. 324 per Lord Merrivale P.
137. Note 109 *supra.*
138. Note 2 *supra,* 80.
139. [1969] 1 W.L.R. 487.
140. Note 6 *supra,* 308.
141. Scottish Law Commission, Memorandum No. 23, *Aliment and Financial Provision* (1976) para. 3. 7.
142. *Brady* v. *Brady* (1973) 3 *Fam. Law* 78. See generally, M. Hayes, "Financial Provision and Property Adjustment Orders: The Statutory Guidelines" (1980) 10 *Fam. Law* 3.
143. Note 135 *supra.*
144. Matrimonial Causes Act 1973 (Eng.) s.25(1): "all the circumstances of the case including...the...financial resources which each of the parties...has...or is likely to have...; ...the financial needs, obligations and responsibilities which each of the parties...has...;... standard of living enjoyed by the family...;...age of each party..." etc.
145. Ss.72, 75, 79.
146. Scottish Law Commission, Memorandum No. 22, *Aliment and Financial Provision* (1976) para. 3. 7; Gray, note 6 *supra;* The Law Commission, note 135 *supra;* Law Reform Commission of Canada, Working Paper 12, *Maintenance on Divorce* (1975); R. Sackville, "The Emerging Australian Law of Matrimonial Property" (1970) 7 *M.U.L.R.* 353.
147. *In the Marriage of Potthof* (1978) 4 Fam. L.R. 267; *In the Marriage of Wardman & Hudson* [1978] F.L.C. 90-466; and see *In the Marriage of Pickard* [1981] F.L.C. 91-034.
148. Working Paper 12, note 146 *supra.*
149. *Id.*, 22.
150. *Id.*, 34-38.
151. This is an important aspect of the much discussed "clean break" principle, as to which see The Law Commission, note 135 *supra,* para. 77, and G. Douglas, "The Clean Break on Divorce" (1981) 11 *Fam. Law* 42. Gray, note 6 *supra,* argues persuasively in favour of public rather than private support of dependent family members. For Australian discussions, see Australian Government Commission of Enquiry, *Law and Poverty in Australia* (Second Main Report, October 1975); R. Sackville, "Social Security and Family Law in Australia" (1978) 27 *I.C.L.Q.* 127; M. D. Brown, "Financial Implications of Family Law" (1981) 55 *A.L.J.* 424; note 2 *supra,* 72ff.
152. Marriage Act 1961 (Cth) s.111A (inserted by Marriage Amendment Act 1976 (Cth) s.23(1)).
153. This position is forcefully argued by the Law Reform Commission of Canada, note 146 *supra,* and also in Working Paper 8, *Family Property* (1975) 33-34.
154. This section summarizes Part III, where the relevant authorities are discussed.
155. Note 2 *supra,* 81.
156. Note 27 *supra.*
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159. Note 34 *supra,* 11,552. In our view these dicta should not be followed, and should be rejected when the opportunity arises before the Full Court of the Family Court or the High Court.
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148. Working Paper 12, note 146 *supra.*
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