

Contributions to Property During Marriage

Michael Emerson

PRINCIPAL

Emerson Family Law



PARTNER

Brisbane Mediations



The Approach of the Court in Property Settlements

Under Section 79 of the Family Law Act (“the Act”) the court has power to make orders redistributing the property of parties to a marriage.

The relevant section provides as follows:

Section 79 – Alteration of Property Interests

(1) [Court may alter parties’ property interests] In property settlement proceedings, the court may make such order as it considers appropriate:

- (a)** in the case of proceedings with respect to the property of the parties to the marriage or either of them – altering the interests of the parties to the marriage in the property; or
- (b)** in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage – altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including:

- (c)** an order for a settlement of property in substitution for any interest in the property; and
- (d)** an order requiring:
 - (i)** either or both of the parties to the marriage; or
 - (ii)** the relevant bankruptcy trustee (if any);to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.

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

The court's power under Section 79 may be exercised over any property owned by either party, or by the parties jointly and is not limited to property acquired during the marriage.

In considering the appropriate order to make, the court must take into account the matters set out in Section 79 (4).

Section 79(4) – Relevant Considerations

In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:

- (a) The financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and
- (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and
- (c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and
- (d) ...
- (e) ...

(f) ...

(g) ...

In determining a property settlement the court follows a four step approach as follows:

1. Identify and value the asset pool of the parties (whether held jointly or individually) and any resources available for distribution.
2. Assess the parties' respective contributions during the marriage.
3. Consider whether a further adjustment is required due to the impact of the section 75(2) factors.
4. Consider whether the proposed orders are just and equitable under section 79(2).

This paper relates to the second step in the four step approach and involves assessing what are commonly referred to as the "contribution" factors made up of Section 79 (4) (a), (b) and (c).

My paper will concentrate on section 79(4)(a) and (b) but to some extent there is some overlapping between the various factors.

Section 79 (4) (a) –Financial Contributions to Property

What is essential under this section is that the contribution be to the acquisition etc of the property or otherwise in relation to the property. A financial contribution to another aspect, such as contributing to the family's welfare will not be relevant under Section 79 (4) (a).

The assessment of financial contributions is not to be a meticulous mathematical exercise. In *Hayne and Hayne*,¹ Pawley J said “[i]n matters such as this one cannot approach the problem with an eye for meticulous detail. It should rather be dealt with broadly so that the end result can be said to be just and equitable.”

In *Garret and Garrett*,² the Full Court held that in the case of a long marriage where the parties’ resources and income have been devoted to the benefit of the family as a unit, it is impossible to have a detailed accounting of the amounts of the parties’ respective financial contributions but that in such a case a broad estimate of the financial contribution of each party is appropriate.

In *In the Marriage of Quinn*,³ her Honour Evatt CJ cautioned against doing mathematical calculations in determining the appropriate property order under section 79.

The CCH Australian Family Law & Practice (“the CCH”) notes that “[t]he fact that financial contribution is the first element outlined in section 79(4) underlines its importance as the starting point for an examination of contributions and the one against which the others are traditionally measured.”

Section 79(b) – Non-Financial Contributions to Property

Section 79 (4) (b) mirrors section 79 (4) (a), except that it deals with contributions other than financial contributions.

- The contributions still have to be to the acquisition, conservation or improvement of the property or otherwise in relation to the property.
- The contribution may be to a property which one or both of the parties had at one stage but which they no longer have.

¹ [1997] FLC 90-265 at 76, 415.

² [1984] FLC 91-539.

- The contribution may be made by or on behalf of a party.

The CCH provides the example where a spouse who selects an investment property, negotiates with the vendor and makes finance arrangements, may if the purchase and borrowings are in the name of the other party make no direct financial contribution but a notable non-financial contribution to the acquisition of the property by the other spouse.

No guidance is given in s 79(4) as to how non-financial contributions are to be weighed up in comparison with financial contributions.

The Nature of Contributions

Contributions to property may then be financial or non-financial, direct or indirect and can be contributions to the acquisition, conservation and improvement of the property.

Examples might be:

- Contributing money, materials or physical labour.
- Doing an act or providing an advantage that is economically significant.

The importance of a direct financial contribution may be offset by other section 79 factors, particularly as the duration of the marriage increases.

Dickey refers to the following cases which give some guidance in relation to contributions:

In the Marriage of Thomas⁴

- In this case, “[t]he fact that by virtue of his employment with a building society the husband was able to obtain a mortgage attracting only 3 per cent interest was

³ (1979) FLC 90-677.

⁴ [1981] FLC 91-018.

held to be a contribution made by him of considerable significance⁵ to the marriage.

In the Marriage of Pellegrino⁶

- Where “[a] wife was held to have made a contribution to property on account of her parents’ providing her and her husband with rent-free accommodation”⁷ over a long period and the fact that it enabled the parties to apply their savings to build up other assets. Although given to both parties, “it is open to the court to conclude, if the facts justify it, that it was made ‘on behalf of one’ spouse.”⁸

In the Marriage of Whiteley⁹

- In this case, “[t]he wife of a successful artist was found to have made significant contributions to her husband’s art work and success by providing him with...inspiration, criticism and advice during the course of the marriage.”¹⁰ The court held that the wife’s contribution was unusually helpful to the artist in his creative activities.

In the Marriage of James¹¹

- Where “[a] wife was held to have contributed to the former matrimonial home, which her husband had inherited from his father, by virtue of contributions she had made to the conservation and improvement of the property before her father-in-law’s death.”¹²

In the Marriage of Heath; Westpac Banking Corporation (Intervener)¹³

- In this case, “[a] wife was held to have contributed to money inherited by her husband from his parents because when his parents, and especially his mother, were elderly and in need of assistance, she had helped to look after them.”¹⁴

⁵ Anthony Dickey, *Family Law* (5th ed, 2007) 572.

⁶ [1997] FLC 92-789.

⁷ Anthony Dickey, *Family Law* (5th ed, 2007) 572.

⁸ *Gosper* (1987) FLC91-818 per Fogarty J.

⁹ [1992] FLC 92-304.

¹⁰ Anthony Dickey, *Family Law* (5th ed, 2007) 572-3.

¹¹ [1978] FLC 90-487.

¹² [1978] FLC 90-487.

¹³ [1983] FLC 91-362.

In ***Zubic and Zubic***,¹⁵ the wife was found to have made a substantial contribution to the conservation of a damages award received by the husband because she performed nursing activities free of charge.

Another example is that of ***Brazel and Brazel***,¹⁶ where the wife's ability as a money manager and her entrepreneurial expertise as an investor were held to be clearly significant contributions which the wife made to the marriage.

An indirect financial contribution can occur where one party permits the other party to make a direct financial contribution, such as a mortgage payment, and in lieu of contributing to same the first party pays day to day household outlays and recurring expenses, such as utility bills. The party paying these household expenses could claim them as an indirect financial contribution or could claim them as a contribution to the welfare of the family, but it is important to ensure that the party doesn't double dip by claiming under two heads of contribution.

In ***Rolfe and Rolfe***,¹⁷ the Full Court held that section 79(4)(b) intends that the wife's contribution by assuming responsibility for the home and the children and freeing the husband to earn income should be recognised not in a token way but in a substantial way.

In ***In the Marriage of Aroney***,¹⁸ Nygh J held that the purpose of section 79(4)(b) is to give recognition to the position of the housewife who, by her attention to the home and the children, frees the husband to earn an income and to acquire assets. His Honour also stated, at 78, 789, that the wife "is not disqualified as a homemaker because she had domestic help and did little physical work around the house."

¹⁴ Anthony Dickey, *Family Law* (5th ed, 2007) 573.

¹⁵ [1995] FLC 92-609.

¹⁶ (1984) FLC 91-568.

¹⁷ [1979] FLC 906-29.

¹⁸ [1979] FLC 90-709.

Dickey notes that “[t]he contribution that a wife makes by freeing her husband to go out to work is regarded by the Family Court as applying not only to the matrimonial home and other domestic assets, but to any assets acquired by a husband as a result of his freedom to pursue his income-producing activities. In particular, a wife is in this way regarded as making a contribution to the acquisition, conservation and improvement of any of her husband’s business assets.”¹⁹

Contributions to Conservation and Improvement of Assets

- Typical examples might include paying the cost of ordinary repairs and maintenance to a matrimonial home which preserve the capital value of the property, such as roofing, plumbing or electrical repairs or garden maintenance.
- The interest component of mortgage repayments on property are more correctly considered payments for the conservation of the property rather than payments for the acquisition of the property. In ***Abbess and Abbess***,²⁰ the court would not allow the husband full credit for the mortgage repayments but considered he should pay a deemed rental for the property to the credit of the parties.
- According to the CCH Australian Master Family Law Guide the distinction between conservation and improvement may be important as it can be regarded as reasonable for a party with use of property such as real estate or a motor vehicle to conserve the item in exchange for the use of it whereas a genuine improvement of property which will improve the value of the property ought to be reflected directly in the same way as a contribution to the initial acquisition.

Clearly, the reduction of the capital indebtedness under a mortgage would be a contribution to the capital value of the property.

¹⁹ Anthony Dickey, *Family Law* (5th ed, 2007) 580.

²⁰ (1976) FLC 90-095.

According to the CCH Australian Family Law & Practice, the essential distinction between a contribution to acquisition and a contribution to an improvement is that in respect of a direct financial contribution to the acquisition of property, one can say with some precision what proportion of the total value of the property is represented by that contribution. For example, a cash contribution of say 10% to the purchase price can represent a contribution of 10% to the total value of the property, whereas an improvement such as building a patio or constructing a garage may be expensive but add only slightly to the value of the property. And some improvements, although adding significantly to the usefulness of a property, may not add to the value at all.

To balance the direct financial contributions to the improvement of a property against a direct financial contribution to the acquisition of a property it may be necessary to ascertain the extent to which the expenditure or the improvement is reflected in the value of the property.

Improvements to Property and Proving Contributions

The following passage from the judgement of Justice Mullane in *Elder & Elder*²¹ illustrates some evidentiary considerations in seeking to prove the carrying out of improvements to property:

[t]he husband claimed in cross-examination that he spent \$75,000 for the extensions. But there were no receipts, other documents, or records produced to corroborate that. In addition, it appeared he did not have the funds. The evidence is that the purchase price of the property three years earlier was \$93,000. In addition they paid stamp duty, lawyer's fees and other expenses of the purchase. They borrowed \$118,000 on mortgage loan. It appears then that there was probably only about \$22,000 or \$23,000 available for expenditure on improvements. It seems that was the likely amount that was spent before the cohabitation, as the husband had no savings at the time cohabitation commenced. It appears that they figure of \$75,000 was mere fiction.

Evidence of contribution to improvements is given on affidavit in the normal course. In ***Elder v Elder*** the wife gave evidence that “[t]he husband] and I did a lot of work ourselves. [The husband] did most of the heavy lifting and specialised jobs. I assisted by painting interior walls, architraves, skirting boards and ceilings, mixing paints, mixing grout and helping with the laying of floor tiles and grouting and finishing off. I helped [the husband] to measure up the dimensions for the built in wardrobes. The built in wardrobes were pre-fabricated and I helped [the husband] to install them in the two new bedrooms.”²²

Corroboration could come from friends or persons who observed the work being undertaken.

There is of course, as always, a need for a party to establish credit and credibility in his or her case.

The following passage from the Judgment of Warnick J in **SL & EHL** [2005] FamCA 132 (8 March 2005) is an example in point.

“I do not suggest that the husband gave deliberately false evidence about matters such as the wife’s contributions as parent, his own parenting contributions, or the wife’s support of him in business activities, but I thought, both in his affidavit and oral evidence, he demonstrated a greater level of subjectivity and generality in the words he chose to describe performance, both his and the wife’s, and was more affected than the wife by the “competition” for a favourable outcome in this case” and further at paragraph 86 that *“In contrast to the position of the husband which by and large is one of a general denial of contribution by the wife in these regards, the wife provides a degree of particularity...”* and at paragraph 90 *“Most of an affidavit of ES filed in the husband’s case was conceded as inadmissible comment.”*

In terms of evidence, preparation is the cornerstone of success in the case.

²¹ [2008] FamCA 850.

²² [2008] FamCA 850, [127].

When considering issues of evidence and proof, it is important that consideration be given to the following:

- (a) the issues in the matter;
- (b) the elements to be proved; and
- (c) the necessary evidence to prove each of the elements.

The usual tools to be utilized might include discovery (both formal and informal), subpoenas to give evidence and to produce documents, notices to produce, requests to answer specific questions and notices to cross examine.

In *Moore*²³, Carmody J described the Step 2 process as follows:

“Next, the contribution based entitlement of each party expressed as a percentage of the available pool of assets has to be determined. This is done retrospectively by counting up past contributions of all kinds of each spouse to the welfare of the family and the acquisition, conservation, improvement of their past and present property or otherwise on either an asset by asset basis or in a global way and then weighting their total contribution quantitatively as well as qualitatively.”

Carmody J notes that “unsurprisingly this task is often undertaken against a background of inadequate oral or documentary evidence. It can be a very detailed, arduous and time consuming process because it can require “raking” over decades of married life...²⁴”

Carmody J goes on however to set out the following observations of the Family Law Council in 1999²⁵:

²³ [2008] FamCA 32.

²⁴ [1981] FLC 91-092 at 76,643-4.

²⁵ Family Law Council, submission on the Attorney-General’s Discussion Paper – Property and Family Law: Options for Change (1999).

There is a considerable gap between the law as set out in the Act and as laid down in some authorities, notably *Mallet*, and the way the system works in practice. While the legislation might be read as suggesting that the Court should identify and evaluate all contributions of each party, in practice this exercise is often carried out rather briskly. For example, the assessment of contributions does not usually involve a detailed examination of the contributions of each party.

According to Carmody J, the best statement of the conventional principle of quantification in Australia is that of Baker J in *Kowaliv*²⁶:

[m]arriage is for most couple an economic partnership. Married couples live together and work together with the ultimate object of purchasing a home, paying it off, acquiring other assets with the overall object of attaining a higher standard of living. The reported decisions in respect of applications for settlement of property under s79 of the Act are unanimous that both parties should share the economic fruits of the marriage, having regard to the provisions of s79(4) and s75(2) although not necessarily equally.

As Parkinson noted, section 79 clearly does not require Court's exercising jurisdiction under it:

"[t]o stand in judgment on the vices or virtues of people who come before it, apart from the question of their responsibility for accruing the assets they did within a framework which gave proven recognition to homemaker contributions. It did not authorise the Court to award merit or demerit points on a party's performance in the office, the kitchen, the workshop, the bedroom, the garden or any other place. It does not require the Court to rake over the intimate and usually mundane details of domesticity. It does not require the Court to assess how devoted each was as a parent... or indeed... to each other in happier times."²⁷

As the law stands, however, it is clearly the task of the court to evaluate the respective contributions of husband and wife. As Mason J said in *Mallet v Mallet*,

²⁶ Parkinson P, 'Quantifying Contributions: Never mind the Quality Feel the width' (paper presented at the 10th National Family Law Conference Melbourne March 2002) at 28.

“[t]he section contemplates that an order will not be made unless the court is satisfied that it is just and equitable to make the order (s.79(2)), after taking into account the factors mentioned in (a) to (e) of s79(4). The requirement that the court ‘shall take into account’ these factors imposes a duty on the court to evaluate them. Thus, the court must in a given case evaluate the respective contributions of husband and wife under paras (a) and (b) of sub s.(4), difficult though that may be in some cases.”²⁸

Are Gifts from Third Parties Contributions?

Generally, it is the spouse who is the recipient of a gift who is regarded as having contributed the gift. In *In the Marriage of Freeman*²⁹, “the wife’s parents provided [significant] sums of money for the purchase of the former matrimonial home which was registered in the joint names of the parties. The first sum of money was found to have been a gift by the parents to both parties [to secure their future accommodation]. It was therefore held to be an equal contribution by the parties. The second sum, however, was found to be a gift to the wife alone. This was accordingly held to be a contribution solely by the wife.”³⁰ It was the intention of the wife’s parents to make a gift to both the wife and her sister of approximately equal sums.

Is a Gift from One Spouse to the Other a Contribution?

Generally, a gift from one spouse to the other is regarded as a contribution by the spouse giving the gift. Dickey provides that in *In the Marriage of W*³¹, “a husband made a gift of \$20,000 to his wife, which she then invested in property. This was held to be a contribution by the husband, and not by the wife. Nygh J said in this case, “The gift by the husband of \$20,000 to the wife remains a ‘contribution’ on his

²⁷ Parkinson P, ‘Quantifying Contributions: Never mind the Quality Feel the width’ (paper presented at the 10th National Family Law Conference Melbourne March 2002) at 28.

²⁸ (1984) 156 CLR 605, [18].

²⁹ [1979] FLC 90-697.

³⁰ Anthony Dickey, *Family Law* (5th ed, 2007) 574.

³¹ [1980] FLC 90-872.

part to her assets, even though he fully intended her to have the benefit of that gift".³²

Contribution to Lump Sum Remuneration

Relying on the authority of *In the Marriage of Burke*³³, Dickey considers that "[w]here the value of a lump sum is determined by the length of employment, the Family Court regards any such sum paid to an employee spouse as remuneration of past employment. From the point of view of contribution, it is accordingly to be viewed in the same way as income received during the course of employment. The other spouse may thus be regarded as having contributed through domestic activities to such a lump sum payment in the same way as he or she is deemed to have contributed to his or her partner's income during the course of the marriage."³⁴

Sharing of Losses

Generally, losses incurred by parties to a marriage, or either of them, should be shared.

In making the comments referred to above about parties sharing the economic fruits of the marriage, in *Kowaliw*,³⁵ Baker J noted at paragraph 76, 644:

[i]s not, however, the converse equally sustainable? In other words, should not financial losses incurred by parties to a marriage or either of them, whether incurred jointly or severally, be shared by them in the same manner as the financial gains? As a statement of general principle I am firmly of the view that financial losses incurred by parties or either of them in the course of a marriage, whether such losses result from a joint or several liability, should be shared by them (although not necessarily equally) ...

³² Anthony Dickey, *Family Law* (5th ed, 2007) 575.

³³ [1992] 112 FLR 250.

³⁴ Anthony Dickey, *Family Law* (5th ed, 2007) 575-6.

³⁵ (1981) FLC 91-092.

In stating this general rule, however, Baker J also set out important exceptions where one of the parties has:

- Embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets; or
- Acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value.

In the event that one or more of these exceptions arises, then it becomes relevant for the court to invoke section 75(2)(o).

In ***Browne v Green***,³⁶ the Full Court supported the view that the views stated by Baker J in ***Kowaliw*** do not constitute any form of fixed code and are no more than guidelines for use in the exercise of the discretionary jurisdiction conferred by section 79, but added:

“[n]evertheless, they have over the considerable period of time since they were enunciated, become a well accepted guideline in the jurisdiction, a guideline the use of which assists in the achievement of the important goal of consistency within the jurisdiction.”

In ***Browne v Green***, the Full Court concluded that it was manifestly unjust to the husband to depart from the ***Kowaliw*** guidelines and to place upon him the full burden of the losses, merely on the basis that he was the party who initiated and had overall control of the venture which led to the financial losses, particularly in circumstances where there is no suggestion that the wife was anything other than a willing participant, the likelihood being that had the project succeeded, the wife would successfully have sought to share in the fruits of that success.

Overcapitalisation

³⁶ (1999) FLC 92-873.

Contributions to real property may not be given full weight if they result in overcapitalisation.

As stated earlier, some improvements, although adding significantly to the usefulness of property, do not add to the value of a property at all.

A property which is capitalised to the maximum sale value will not derive additional value from expenditure or improvements and these will have the effect of overcapitalising the property.

Dickey propounds that “[w]here both spouses are responsible for overcapitalization of property, the court regards it as appropriate that each be deemed responsible for any net loss due to overcapitalization in proportion to their respective contributions: ***In the Marriage of Vrbetic***.³⁷

It seems then that in assessing contributions the court has more regard to the current financial consequences of the contributions rather than to their worth at the time of making.

In ***Vrbetic***, the net value of the house and land was \$85,000. The husband purchased the land prior to the marriage and it was now worth \$40,000 but the wife had contributed \$58,000 to the building of a house on the land. Because of the overcapitalisation each had contributed more than the net worth of what resulted from their contributions and the loss had to be shared between the parties in a meaningful way.

Dickey further provides that “[w]here only one spouse is responsible for the overcapitalization, it is considered proper that this party should normally be deemed responsible for the entire net loss.”

In ***In the Marriage of Willmore***,³⁸ the parties separated and their home was sold and proceeds divided. On another block, the wife built a home for her use and the

³⁷ [1987] FLC 91-832.

³⁸ [1988] FLC 91-975.

husband a log cabin. Three valuers agreed the husband had overcapitalised and his building was not approved.

In an unreported decision of the Full Court in ***Chance and Bryant***,³⁹ the wife overcapitalised the matrimonial home by extensions paid for from an inheritance. The total value of the property was \$60,000, of which \$10,000 was attributable to extensions even though the wife spent \$55,000 on them. The Full Court held that the trial judge was in error in overstressing the importance in monetary terms of the wife's contribution as much of it was wasted in overcapitalisation.

Section 79(4) (c) – Contribution to the Welfare of the Family

Section 79(4)(c) provides that a court must consider the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent.

Dickey notes that “[t]he purpose of paragraph (c) is to enable the court to take into account the domestic activities of parties to a marriage without regard to their economic consequences. The court may accordingly take into account under this paragraph the contributions made by a spouse to the family's welfare by cooking for the family, caring for the children, and providing the family with encouragement and support.”⁴⁰ However, it is important to note that contributions include economic, as well as non-economic, activities.

Contributions to the welfare of the family during a premarital and pre cohabitation period are relevant – see ***W and W***.⁴¹ The Full Court held that the trial judge had erred in making no allowance for the contributions by the wife to the care of the elder child in the seven years prior to cohabitation and marriage. The mere fact that the

³⁹ (1986).

⁴⁰ Anthony Dickey, *Family Law* (5th ed, 2007) 583; *In the Marriage of Parker* [1983] FLC 91-364 at 78, 446.

⁴¹ [1997] FLC 92-723.

parents of a child subsequently marry is sufficient to make contributions prior to cohabitation relevant under section 79(4)(c).

See also *In the Marriage of Olliver*,⁴² where the Full Court of the Family Court said that the court is entitled to look at the whole history of the cohabitation of the husband and wife for the purposes of determining what alteration of property interests it should make.

Contributions made to the welfare of the family after separation are within section 79(4)(c). See *Kirby and Kirby*⁴³ – a husband who had made significant payments to the family post-separation was entitled to have those payments taken into account as contributions under section 79(4)(c), in addition to offsetting arrears of child support payments.

Interestingly, unlike section 79(4) (a) and (b), section 79(4)(c) does not extend to contributions made on behalf of a party by some other person. Thus, in *AB v ZB*,⁴⁴ childcare provided by the wife's parents while she was at work was not considered to be a contribution.

Similarly, contributions to the cost of the wedding and reception by a partner's parents would not be allowed under this head but could be seen as an indirect financial contribution under section 79(4)(a).

I will leave it to my colleagues in this presentation to expound in greater detail on the homemaker contribution, including contributions that are made more onerous by the conduct of the other party.

Length of Marriage

The importance of a direct financial contribution, for example, to the purchase price of a home may be offset by other relevant factors under Section 79, particularly as the duration of the marriage increases.

⁴² [1978] 32 FLR 129.

⁴³ [2004] FLC 93-188.

In *Bremner & Bremner*,⁴⁵ the Husband had a four acre block of land at the commencement of the marriage and an issue arose as to whether the husband should be accorded a greater proportion as a result of his initial contribution. The trial judge assessed the contributions overall as equal. The Full Court looked at the differing approach of Lindenmayer J and Fogarty J in *Money and Money*.⁴⁶ Lindenmayer J had stated that “the contribution by spouse A during the marriage can only be regarded as an offsetting contribution to an initial contribution by spouse B to the extent that the contribution by spouse A during the marriage exceeds the contribution made by spouse B during the marriage.” Fogarty J disagreed, stating that “an initial substantial contribution by one party may be eroded to a greater or lesser extent by the later contributions of the other party even though those later contributions do not necessarily at any particular point outstrip those of the other party.” The Full Court disagreed with Lindenmayer J and preferred Fogarty J’s approach.

In *Pierce v Pierce*,⁴⁷ the trial judge found that the husband’s substantial initial contribution had been eroded over the period of cohabitation, which was just over ten years. The Full Court allowed the husband’s appeal and said it was not so much a matter of erosion of contribution but a question of what weight was to be attached, in the whole of the circumstances, to the initial contribution. The use made by the parties of that contribution was relevant. In this case it was a substantial contribution to the purchase price of the matrimonial home.

In *Pierce*, at the time of the marriage the husband had assets to the value of \$226,000 while the wife had assets with an estimated value of \$11,500. The trial judge considered the contributions overall to be equal. The Full Court, in allowing the husband’s appeal and in re-exercising the discretion, assessed the husband’s contributions at 70%. At the date of the trial the parties had assets of a net value of \$319,190, which included the matrimonial home valued at \$260,000 to which the

⁴⁴ [2003] FLC 93-140.

⁴⁵ (1995) FLC 92-560.

⁴⁶ (1994) FLC 92-485.

⁴⁷ [1999] FLC 92-844.

husband had contributed about \$200,000 from moneys to which the wife had made no contribution. In the Full Court's view, the trial judge failed to properly weigh the greater initial contribution of the husband, with all other relevant contributions, and seems not to have had regard to the use made by the parties of the husband's greater initial contribution.

In short marriages, there is a closer examination of the partner's relevant financial contributions, particularly if there are no children.

A short marriage is often used to describe a marriage which lasts for less than five years.

Section 75 (2) factors are less likely to be important in short marriages and it may be just and equitable to make an order which only reflects contributions.

In **Anastasio and Anastasio**⁴⁸ the parties cohabitated for 14 months. Both had savings at the time of the marriage and worked during the cohabitation. While the Trial Judge was not ordinarily attached to a mathematical approach, having regard to the facts and in particular, the shortness of the marriage, he held each party should take what they contributed to it directly financially.

In **D and D**⁴⁹ Carmody J reviewed some of the cases on short marriages.

The time at which a contribution is made can be very relevant.

In **Aleksovski**,⁵⁰ Kay J said inter alia "what is important is to somehow give a reasonable value to all the elements that go to making up the entirety of the marriage relationship. Just as early capital contribution is diminished by subsequent events during the marriage, late capital contribution which lends to an accelerated improvement in the value of the assets of the parties may also be given something less than directly proportional weight" because of those other elements.

⁴⁸ [1981] FLC 91-093.

⁴⁹ [2006] FamCA 245.

Some Further Aspects of Assessing and Weighing Contributions

The assessment and weighing of contributions has always been a vexed and controversial area of the court's jurisdiction.

Exercise of Discretion

In exercising its powers under section 79 of the Act, the court has discretionary power to make whatever orders it considers appropriate in the particular circumstances of the case.

In *Moore v Moore*,⁵¹ Carmody J embarks on a very detailed discussion of the discretion exercised by judges under section 79 and discretionary decision making generally. He refers to the Australian Law Reform Commission in its report on matrimonial property:

The weighing of the factors listed in section 79(4) and section 75(2) involves value judgments in which opinions may differ among judges as well as ... people generally. How should financial contributions be weighed against non-financial contributions as homemaker and parent? Does work done by one spouse as homemaker and parent contribute only to the acquisition of assets for domestic use, or to all assets acquired by the other spouse, including business assets? How should the future needs of the custodial parent be balanced against the spouses' respective contributions during the marriage?⁵²

⁵⁰ (1996) FLC 92-705.

⁵¹ [2008] FamCA 32 (25 January 2008).

⁵² Australian Law Reform Commission, Matrimonial Property, Report No. 39 (1987) at 30

An early interpretation of section 79 was provided in **Potthoff**,⁵³ where Fogarty J in the Full Court said:

... where a court under the Family Law Act is dealing with jointly owned assets or assets which are acquired or built up by the joint efforts of the parties in a marriage which has lasted for a number of years, equality is ... at least the starting point. One should then look to the particular circumstances of the individual case to see whether a change from that position in all the circumstances is justified.

In 1983, the Family Law Act was amended to delete the indirect contribution as “a homemaker and parent” from subsection 79(4)(b) and to make it a separate factor in subsection 79(4)(c) but at the same time it was broadened to include any family welfare contribution, including as homemaker and parent.

In 1984, the High Court in **Mallet** repudiated the “equity is equality” starting point affirmed by the Full Court in **Potthoff** as a misconception of section 79. Mason J in **Mallet** said that “the court must in a given case evaluate the respective contributions of husband and wife under paragraph (a) and (b) of subsection (4), difficult though that may be in some cases.”⁵⁴ Gibbs CJ stated that there was no rule, principle or presumption that where assets are built up by the joint efforts of the parties to a marriage over a significant period equality is a convenient starting point.

In **Ferraro**,⁵⁵ the Full Court acknowledged the difficulty of evaluating and comparing the parties’ contributions where one party had exclusively been the breadwinner and the other exclusively the homemaker because the evaluation and comparison could not be conducted on “a level playing field.”

In **Moore**,⁵⁶ Carmody J notes that “the value of the homemaker contribution is now ascertained under section 79(4)(c) without any external point of reference to property (whenever acquired) based on the contribution of the parties to the

⁵³ (1978) FLC 90-475 at 77,446.

⁵⁴ (1984) 156 CLR 605

⁵⁵ (1993) FLC 92-335.

⁵⁶ [2008] FamCA 32

marriage as a whole and to the efforts they made as well as their economic achievements.” It does not simply measure the quantity or quality of the contribution having regard to what is given, but also to the cost of giving it.

Thus, as well as being given credit under section 79(4)(b) for the non-economic contribution her efforts made to property, for instance, promoting the success of a business freeing her husband to earn the income, saving on expenses, the wife’s contribution as homemaker and parent was assessable in its own right under paragraph (c), regardless of whether it had any discernible economic impact or not . Carmody J comments that there are “very good reasons to think that the 1983 amendment effectively moved the focus of the enquiry from contribution to the “fruits of the marriage” to the fundamental partnership features of the union as the primary determinant or measurement of entitlement without having to establish any actual link between what was done and property values.

In this context he refers to the decision in **Shaw**⁵⁷, in which a homemaker was given a share of pre-marriage assets where they diminished or did not increase during the marriage. The Full Court took the view that it should place a value on the wife’s contribution, even though there was no gain in wealth and awarded her 10-12% of the remaining property by way of contribution and a similar amount on the basis of section 75(2) considerations. He says that on a contribution basis the decision is hard to justify because the wife made no financial contribution to the acquisition or improvement of what was left of the pre-marriage property constituting the distributable pool. The length or nature of the marriage relationship eroded the significance of the husband’s pre-marriage assets. The wife, except for her welfare contribution, consumed rather than conserved. In return, the husband provided her with a lifestyle she could not have enjoyed from her own resources.

Among other points made by Carmody J in his detailed analysis of contributions in **Moore** are the following:

⁵⁷ (1989) FLC 92-010.

- Our “special contributions” principle owes its existence to the High Court’s decision in **Mallet** which quantifies homemaking contribution “as being equal to the efforts of the other spouse in earning income during the course of the marriage except where there is a proven disparity in quantity or quality.”
- The concepts of fairness or justice and equity in relation to family property continuously redefines itself to take account of changing social conditions and circumstances.
- There are powerful arguments supporting the proposition that the only true non-discriminatory basis for adjusting property rights within marriage is a “partnership concept” of “both spouses making a positive and notionally equal contribution to wealth and welfare in performing their chosen or allocated role within the marriage.”
- He concludes that the “qualitative or evaluative method of assessment endorsed by the High Court in **Mallet** and the idea accepted by **Ferraro** that there is a link between the accumulation of great wealth and ‘special features’ of the contribution of the breadwinning spouse which should properly be reflected in the financial distribution continue to obstruct the adoption of a true partnership entitlement approach in this country.”
- He expresses the view that a reconsideration of the scope of the “special contributions” doctrine in Australia is looming and that the only legally principled and rationally coherent way of displacing the special contribution doctrine would be for the Full Court to take the lead of the House of Lords in Cases such as **White**⁵⁸ and **Miller**⁵⁹ and “assess contribution based entitlements as prima facie equal in all marriages through a non discriminatory partnership sharing principle “and that this would still enable a domestic violence victim to be given a loading for the extra effort that she went in to making the contribution because of

⁵⁸ *White v White* [2001] 1 AC 596.

⁵⁹ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618.

physical or emotional injury as in *Kennon*,⁶⁰ and it would also recognise gross disparity in overall contribution.

- Carmody J argues for an urgent reconsideration of the qualitative approach and sees a need for statements of principle and guidelines by the Full Court to help clarify areas of the law where there is currently judicial division on conflicting case law, and would assist in cases being resolved in a “principled and predictable, reasoned, coherent and transparent way.”

While the views of Carmody J are interesting and on one view encapsulate the ongoing debate and criticism of the evaluation approach set out by the High Court in *Mallet*, in the recently handed down decision of the Full Court in *Butler*, where Carmody J was the trial judge, he was roundly criticised for failing “to consider and make findings, except in the most general way, about the husband’s contributions, nor did he properly evaluate and weigh those contributions against the wife’s contributions.”⁶¹

The Full Court went further, however, and said that in his apparent rejection of the Full Court authorities of *D and D*⁶² and *GBT and DJT*,⁶³ which Carmody J saw as a strict evaluative approach, his Honour was demonstrating a misunderstanding of the importance of precedent in our legal system.⁶⁴

Carmody J in *Moore* gives considerable attention to the influence of “values” in discretionary decision making. In that regard I would recommend a reading of the decision of his Honour Justice Warnick in *SL & EHL*⁶⁵ where his Honour discussed at length the presence of “values” in the assessment of contributions under s.79 and noted that an acknowledgment that value judgments are part of the court process “assists in understanding the movement over the years discernable in the outcomes of apparently similar cases”, and further that in his Honour’s view “unless the role of

⁶⁰ (1997) FLC 92-757 at 84, 290-295.

⁶¹ (2008) FamCAFC NA14 at 89, 20

⁶² (2006) FLC 93-300.

⁶³ [2005] FamCA 683.

⁶⁴ (2008) FamCAFC NA14 at 72, 15

values in the determination of property disputes is recognised, the chain of authority is mysterious”. His Honour proceeds to trace the case law through from the decision of the High Court in *Mallet* and what follows is an interesting discussion of the various decisions and trends on the issues of contributions in the context of the values espoused in those decisions.

How the law develops from here and the values it encapsulates will be interesting indeed.

Michael J. Emerson

Dated: 5 February 2009

Books

Anthony Dickey, *Family Law* (5th ed, 2007)
CCH Australian Family Law & Practice (2005)
CCH Australian Master Family Law Guide (2nd ed, 2008)

Papers

Australian Law Reform Commission, Matrimonial Property, Report No. 39 (1987)
Family Law Council, submission on the Attorney-General's Discussion Paper – Property and Family Law: Options for Change (1999)
Parkinson P, 'Quantifying Contributions: Never Mind the Quality Feel the Width' (paper presented at the 10th National Family Law Conference in Melbourne, March 2002)

Cases

AB v ZB [2003] FLC 93-140
Aleksovski (1996) FLC 92-705.
Anastasio and Anastasio [1981] FLC 91-093
Brazel and Brazel (1984) FLC 91-568
Bremner & Bremner (1995) FLC 92-560
Browne v Green (1999) FLC 92-873
Butler & Butler [2008] NA14 2008
Chance and Bryant (1986) (unreported decision of the Full Court of the Family Court)

D and D [2006] FamCA 245
Elder & Elder [2008] FamCA 850
GBT and DJT [2005] FamCA 683
Garret and Garrett [1984] FLC 91-539
Gosper (1987) FLC91-818
Hayne and Hayne [1997] FLC 90-265
In the Marriage of Burke [1992] 112 FLR 250
In the Marriage of Doherty [1996] FLC 92-754
In the Marriage of Freeman [1979] FLC 90-697

In the Marriage of Heath; Westpac Banking Corporation (Intervener) [1983] FLC 91-362

In the Marriage of James [1978] FLC 90-487

In the Marriage of Kennon [1997] FLC 92-757

In the Marriage of Marando [1997] FLC 92-754

In the Marriage of Olliver [1978] 32 FLR 129

In the Marriage of Parker [1983] FLC 91-364

In the Marriage of Pellegrino [1997] FLC 92-789

In the Marriage of Q [2003] FLC 93-163

In the Marriage of Quinn (1979) FLC 90-677

In the Marriage of Stevens [2005] FLC 93-246

In the Marriage of Thomas [1981] FLC 91-018

In the Marriage of Vrbetic [1987] FLC 91-832

In the Marriage of W [1980] FLC 90-872

In the Marriage of Whiteley [1992] FLC 92-304

In the Marriage of Willmore [1988] FLC 91-975

Kennon (1997) FLC 92-757

Kirby and Kirby [2004] FLC 93-188

Mallet v Mallet (1984) 156 CLR 605

Miller v Miller; McFarlane v McFarlane [2006] 2 AC 618

Money and Money (1994) FLC 92-485

Moore v Moore [2008] FamCA 32

Pierce v Pierce [1999] FLC 92-844

Potthoff (1978) FLC 90-475

Rolfe and Rolfe [1979] FLC 906-29

Shaw (1989) FLC 92-010

W and W [1997] FLC 92-723

White v White [2001] 1 AC 596

Zubcic and Zubcic [1995] FLC 92-609

Legislation

Family Law Act 1975 (Cth)