"FAMILY LAW AND EQUITY – FRIENDS, ENEMIES OR FRENEMIES?"

Peter Nygh Memorial Lecture – 19th National Family Law Conference

15 August 2022

The Hon Justice Michelle Gordon AC*

Introduction

It was a great privilege to have been invited to deliver the Peter Nygh Memorial Lecture. The lecture provided an opportunity to

---

* Justice of the High Court of Australia. This is an edited version of the Peter Nygh Memorial Lecture delivered virtually at the 19th National Family Law Conference on 15 August 2022. The author acknowledges the considerable assistance of Luke Chircop and Elizabeth Brumby in the preparation of this article and Professor Belinda Fehlberg and other reviewers for their comments on earlier drafts. Errors and misconceptions remain with the author.

honour Dr Nygh's life, legacy, and contribution to Australian and international law, and particularly family law.

Dr Nygh was born in Germany, received his primary and secondary education in the Netherlands and, after emigrating to Australia in 1951, completed his tertiary education at the University of Sydney Law School[1]. He then travelled to the United States on a Fulbright Scholarship and obtained a doctorate (SJD) from the University of Michigan[2]. As will quickly become apparent, the notably international flavour of Dr Nygh's early life and education was a theme which stayed with him throughout his remarkable career.

Dr Nygh commenced as a lecturer at the University of Tasmania in 1960, moving to the University of Sydney in 1965[3]. In 1971, he spent a year in Germany on a Von Humboldt scholarship at the University of Koln, and in 1973 he was appointed the Founding Head

---

1 Siehr, "Peter E Nygh", in Einhorn and Siehr (eds), *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E Nygh* (2004) at v.

2 Bennett, "Peter Edward Nygh" (2002) 76 *Australian Law Journal* 595 at 595.

3 Brereton, "Aspects of Domestic and International Law and Practice in Adoptions", speech delivered as the Peter Nygh Memorial Lecture at the 16th National Family Law Conference, 8 October 2014 at 2.

and Professor of Law at Macquarie University Law School[4]. In David Bennett's obituary to Dr Nygh published in the *Australian Law Journal*, the then Solicitor-General observed that Dr Nygh "was a gifted teacher with a rare ability of being able to explain complex concepts in simple terms and of engaging his students"[5]. Dr Nygh is also frequently remembered and celebrated for his impressive body of scholarly work – impressive not only because of its size and influence[6], but also because of its breadth. Dr Nygh published on a wide range of topics including family law, conflict of laws, refugee law, freedom of interstate trade, police powers, tort and damages just to name a few[7].

Dr Nygh was appointed a judge of the Family Court of Australia in 1979 and was appointed to the Appeal Division of that Court in

---

4 Brereton, "Aspects of Domestic and International Law and Practice in Adoptions", speech delivered as the Peter Nygh Memorial Lecture at the 16th National Family Law Conference, 8 October 2014 at 2.

5 Bennett, "Peter Edward Nygh" (2002) 76 *Australian Law Journal* 595 at 595.

6 See, eg, Nygh, *Guide to the Family Law Act* (1986); Nygh, "Choice of Law in Federal and Cross-vested Jurisdiction", in Opeskin and Wheeler (eds), *The Australian Federal Judicial System* (2000); *Nygh's Conflict of Laws in Australia*, 8th ed (2010).

7 A full list of Dr Nygh's publications is set out in Einhorn and Siehr (eds), *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E Nygh* (2004) at 501.

1983[8]. As a judge, Dr Nygh was described by one of his colleagues as being "invariably fair and judicial in demeanour, and courteous to counsel, parties and witnesses"[9]. That is no doubt the reason others have remarked that "even the losing litigant always left [Justice Nygh's] courtroom knowing that he or she had received a fair hearing"[10]. While sitting as a judge, Dr Nygh also chaired the Family Law Council from 1986 to 1989 and was a part-time Commissioner of the Australian Law Reform Commission ("ALRC") between 1989 and 1992[11]. During that time, he gained a Doctor of Laws degree from the University of Sydney for his scholarly publications, especially his book *Conflict of Laws in Australia*[12]. Dr Nygh retired from the Family Court in 1993[13].

---

8 Kirby, "Peter Nygh, Family Law, Conflicts of Law & Same-Sex Relations", speech delivered as the Peter Nygh Memorial Lecture at the 12th National Family Law Conference, 23 October 2006 at 3.

9 Brereton, "Aspects of Domestic and International Law and Practice in Adoptions", speech delivered as the Peter Nygh Memorial Lecture at the 16th National Family Law Conference, 8 October 2014 at 2.

10 Bennett, "Peter Edward Nygh" (2002) 76 *Australian Law Journal* 595 at 595.

11 Kirby, "Peter Nygh, Family Law, Conflicts of Law & Same-Sex Relations", speech delivered as the Peter Nygh Memorial Lecture at the 12th National Family Law Conference, 23 October 2006 at 3.

12 Purvis, "Eulogy: The Hon Dr Peter Nygh, AM" [2002] *Australian International Law Journal* xvii at xviii.

13 Bennett, "Peter Edward Nygh" (2002) 76 *Australian Law Journal* 595 at 595.

Throughout his career, and particularly after his retirement from the Family Court, Dr Nygh was "an indispensable member, promoter and scientific leader" of both the International Law Association ("the ILA") and the Hague Conference on Private International Law[14]. Dr Nygh made a significant contribution to the ILA's work on "Collisions at Sea", the "Intercountry Adoption and Protection of Children", and "International Civil and Commercial Litigation"[15]. He served as a member of the Australian delegation to the Hague Conference on two occasions (in 1976 and 1996) and was appointed as reporter for the Conference's nineteenth session, working on a worldwide convention on jurisdiction and the enforcement of judgments[16]. Dr Nygh was invited to deliver the lectures for the General International Law Course at the Academy of International Law in the Hague in 2002, which he considered to be the "summit of his career"[17]. It was sadly through illness that he was unable to deliver those lectures.

---

14 Siehr, "Peter E Nygh", in Einhorn and Siehr (eds), *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E Nygh* (2004) at vi.

15 Siehr, "Peter E Nygh", in Einhorn and Siehr (eds), *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E Nygh* (2004) at vi.

16 Siehr, "Peter E Nygh", in Einhorn and Siehr (eds), *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E Nygh* (2004) at vi.

17 Bennett, "Peter Edward Nygh" (2002) 76 *Australian Law Journal* 595 at 596.

Even in this brief account of his professional life, what immediately emerges is that Dr Nygh, in both his scholarship and practise, embraced the *interconnectedness* of different parts of the law. He had obviously committed himself to mastering the connection between different *legal systems*, which is made plain by his work on conflict of laws and the enforcement of foreign judgments. But just as significantly, he understood the many and important connections between different parts of *Australian* law, including the connection between family law and areas such as sexual discrimination[18], superannuation[19] and trusts[20]. And it is *that* aspect of Dr Nygh's life and legacy that I want to particularly pay tribute to by speaking about the relationship between two parts of Australian law which are increasingly coming into contact: family law and equity.

I was bolstered in my suspicion that this topic is one which may have been of interest to Dr Nygh when I came across a decision he handed down in 1979, just three months after his appointment to the Family Court. The decision is *In the Marriage of Aroney*[21], and it concerned the settlement of property following the dissolution of a

---

18 Nygh, "Sexual Discrimination and the Family Court" (1985) 8 *University of New South Wales Law Journal* 62.

19 Nygh, "Superannuation and Family Law" (1998) 12 *Australian Journal of Family Law* 210.

20 Nygh and Cotter-Moroz, "The Law of Trusts in the Family Court" (1992) 6 *Australian Journal of Family Law* 4.

21 (1979) 5 Fam LR 535.

24-year marriage in which the wife's contribution was mainly as a homemaker, and the husband's contribution was mainly professional and financial. Applying the then relatively new s 79 of the *Family Law Act 1975* (Cth)[22], Justice Nygh took full account of the wife's non-financial contributions to the relationship in ordering that she should receive 30 per cent of the (substantial) shared assets of the parties. Whilst 30 per cent appears low in 2022, it was a significant step forward in 1979.

In the course of submissions, counsel for the husband had pressed an argument that only "matrimonial property", and not the business assets of the husband, were to be settled under s 79. Counsel had contended that as the wife had "no involvement whatsoever" in the business of her husband, business assets should not be taken into account in settlement[23].

Justice Nygh's response to this argument was clear and concise. His Honour held: "In my opinion no distinction can usefully be drawn between so-called marital assets on the one hand and business assets on the other hand … [T]he approach is misconceived in principle: it assumes that the housewife makes no contribution direct or indirect to the husband's economic future … [T]he *purpose*

---

22 Until 1983, s 79 did not include s 79(4)(c) which now refers to "the contribution made by a party to the marriage to the welfare of the family … including any contribution made in the capacity of homemaker or parent".

23 *In the Marriage of Aroney* (1979) 5 Fam LR 535 at 539.

of s 79(4)(b) [of the *Family Law Act*] is to give recognition to the position of the housewife who by her attention to the home and the children frees her husband to earn an income and acquire assets"[24].

I refer to this passage not only because it is an emphatic example of the good sense and practical judgment that Justice Nygh brought to the Family Court for more than a decade thereafter, but also because it was an early illustration of the property settlement provisions of the *Family Law Act* being applied in a way which achieved a just outcome. It is unsurprising, for reasons which I will come to, that *doctrines* and *principles* of equity were not a feature of the decision. Nonetheless, it is plain that equitable *values* of good conscience, fairness and real justice pervaded Justice Nygh's reasons.

Today, more than 40 years since *Aroney* was decided, equity is playing a greater role in the application of the property settlement provisions of the *Family Law Act*. I would like to address *how* and *why* that is the case. I would then like to make three general observations: the first is to identify and explain the irony of this state affairs; the second is about the implementation of family law in practice; and the third is about law reform and the future.

---

24 *In the Marriage of Aroney* (1979) 5 Fam LR 535 at 540.

Background and context

Section 79 of the Family Law Act

Before getting to those observations, it is necessary to begin by briefly addressing the scope and operation of s 79 of the *Family Law Act*. Section 79 provides the courts with broad powers "[i]n property settlement proceedings" to "make such order[s] as it considers appropriate" to alter the interests of the parties to the marriage in the property of the marriage[25]. The approach to property settlement under s 79 has been settled for some time. Since 2009, a similar property settlement procedure has applied to separating de facto partners[26], and the same settled approach to s 79 has been adopted in that context[27].

There are two steps.

First, s 79(2) provides that "[t]he court shall not make an order under [s 79] unless it is satisfied that, in all the circumstances, it is just and equitable to make the order"[28]. This requires the court to

---

25 *Family Law Act*, s 79(1).

26 *Family Law Act*, s 90SM.

27 *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth), Sch 1, Pt 1, item 50. See also *Watson v Ling* (2013) 49 Fam LR 303 at 304 [4]; *Hunter v Borman* (2020) 62 Fam LR 39 at 46 [31].

28 *Stanford v Stanford* (2012) 247 CLR 108 at 120 [35].

identify the *existing* legal and equitable interests of the parties in the properties, according to the usual laws of legal titles and equitable principles which govern the rights of any two people who are not spouses[29]. Once those *existing* interests have been identified, the question posed by s 79(2) is whether, having regard to those interests, "the court is satisfied that it is just and equitable to make a property settlement order"[30].

Second, if a property settlement order *is* to be made in a given case, the court *shall* – must – take into account certain matters. Those matters are set out in s 79(4) and, without attempting to be exhaustive, they include:

- "the financial and non-financial contributions, both direct and indirect, by the parties to the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage[31];

---

29 *Stanford v Stanford* (2012) 247 CLR 108 at 120 [37], 121 [39]. cf *In the Marriage of Hickey; Attorney-General (Cth) (Intervener)* [2003] FamCA 395; (2003) FLC 93-143.

30 *Stanford v Stanford* (2012) 247 CLR 108 at 120 [37].

31 *Family Law Act*, s 79(4)(a) and (b).

- the contributions by the parties to the marriage to the welfare of the family, including any contribution made in the capacity of homemaker or parent[32];

- the effect of any proposed order on the earning capacity of either party to the marriage[33];

- any other order made under the *Family Law Act* affecting a party to the marriage[34]; and

- the matters referred to in s 75(2), so far as they are relevant[35]. The matters referred to in s 75(2) are the matters which are to be taken into account by the court in exercising its jurisdiction in relation to spousal maintenance. Again, without being exhaustive, the s 75(2) matters include "the income, property and financial resources of each of the parties"[36] and "the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt"[37].

---

32 *Family Law Act*, s 79(4)(c).

33 *Family Law Act*, s 79(4)(d).

34 *Family Law Act*, s 79(4)(f).

35 *Family Law Act*, s 79(4)(e).

36 *Family Law Act*, s 75(2)(b).

37 *Family Law Act*, s 75(2)(ha); *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 454 [58].

As the High Court made clear in *Stanford v Stanford*, the two steps are not to be conflated[38]. While s 79 confers broad powers to make property settlement orders, it is not to be "exercised according to an unguided judicial discretion"[39]. It is to be exercised "in accordance with legal principles, including the principles which the Act itself lays down"[40].

This legislative scheme for property settlement is far from perfect. Some of the many proposals which have been made for its reform will be addressed below. For now, it is sufficient to note that it is this scheme – and the approach which has been settled at least since *Stanford* – to which equity applies[41].

The question then is, how does equity apply to it? Does it apply often? And to what effect?

---

38 *Stanford v Stanford* (2012) 247 CLR 108 at 120 [35], 121 [40]. cf *In the Marriage of Hickey; Attorney- General (Cth) (Intervener)* [2003] FamCA 395; (2003) FLC 93-143.

39 *Stanford v Stanford* (2012) 247 CLR 108 at 120 [38].

40 *Stanford v Stanford* (2012) 247 CLR 108 at 121 [40], citing *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 257.

41 See also *Family Law Act*, s 21(2A) inserted by *Civil Law and Justice Legislation Amendment Act 2018* (Cth), Sch 6, item 8.

The role of equity in property settlement under s 79

One of the clearest examples of modern equity playing a role in "softening", or perhaps "preserving", the effect of s 79 of the *Family Law Act* can be seen in the way that equitable principles interact with financial agreements entered into before, during or after the breakdown of a relationship[42]. Where there is a financial agreement at play, vitiating factors, such as undue influence, unconscionable conduct and duress, have been critical to ensuring that the *existing* property interests of the parties are correctly ascertained for the purposes of s 79(2)[43]. Put in different terms, these vitiating factors can provide a basis for financial agreements to be set aside so that s 79 applies to financial matters or financial resources covered by such agreements[44].

It arises in this way. Section 71A provides that the property settlement provisions will *not* apply to property of the parties covered by a valid and binding financial agreement. Thus, if all the parties' property is covered by a financial agreement affected by vitiating circumstances it must be set aside for s 79 to have any work to do.

---

42 Sarmas and Fehlberg, "Equity, the Free Market and Financial Agreements in Family Law: *Thorne v Kennedy*" (2019) 8 *Family Law Review* 16 at 16. The financial agreement provisions (Part VIIIA) were inserted into the *Family Law Act* in 2000: *Family Law Amendment Act 2000* (Cth), Sch 2, item 10.

43 *Stanford v Stanford* (2012) 247 CLR 108 at 120 [36]-[37]; *Hsiao v Fazarri* (2020) 94 ALJR 961 at 976-977 [66]; 383 ALR 446 at 463-464.

44 *Family Law Act 1975* (Cth), s 71A.

Further, if a financial agreement *is* set aside, and a property settlement order is subsequently sought, as mentioned earlier, *Stanford* requires that the first step in the analysis is to determine whether it is "just and equitable" to make such an order, identifying the *existing* legal and equitable interests of the parties. Put another way, in setting aside a financial agreement affected by vitiating factors, a court alters the existing legal and equitable interests of the parties and re-establishes the starting point for the s 79 analysis.

The High Court's decision in *Thorne v Kennedy* has received considerable attention in this respect[45]. In that case, the Court restored an order of the primary judge under s 90K(1) of the *Family Law Act* setting aside a financial agreement entered into between Ms Thorne and Mr Kennedy on the basis that the agreement was voidable. In the High Court, that result was explained on the basis of the equitable doctrine of undue influence (Kiefel, Bell, Gageler, Keane and Edelman JJ) and unconscionable conduct (the whole Court)[46].

The facts are well known. Ms Thorne had migrated to Australia to marry Mr Kennedy, a wealthy property developer. Four days before the wedding, Ms Thorne signed a pre-nuptial financial agreement, against the advice of an independent solicitor, which contained minimal provision for Ms Thorne in the event of separation.

---

45 (2017) 263 CLR 85.

46 *Thorne v Kennedy* (2017) 263 CLR 85 at 113 [67], 113 [69], 117 [79].

She did so because she was told by Mr Kennedy that if she did not sign the agreement, the wedding would not go ahead. By that time, wedding guests had been invited, Ms Thorne's family had flown to Australia from eastern Europe, Ms Thorne's dress had been made and the wedding reception had been booked. A second, post-nuptial, financial agreement was signed two months after the wedding in similar terms to the pre-nuptial agreement. Ms Thorne and Mr Kennedy separated four years later and, after being given the name of a lawyer by a stranger in a hairdresser's[47], Ms Thorne commenced proceedings to have the agreements set aside[48].

In finding that the agreements were voidable for undue influence, the plurality observed that "the constant rule in Equity is, that, where a party is not a free agent, and is not equal to protecting [themselves], the Court will protect [them]"[49]. Pressure can deprive a person of free choice where "it causes the person substantially to subordinate his or her will to that of the other party"[50]. The plurality

---

47 Shoebridge and Turnbull, "How Advice at the Hairdresser's to a Millionaire's Ex Might Have Changed Prenups in Australia Forever" (ABC News) 10 November 2017, available at <https://www.abc.net.au/news/2017-11-10/prenup-shake-up-in-landmark-thorne-v-kennedy-case/9138030>.

48 *Thorne v Kennedy* (2017) 263 CLR 85 at 91-94 [7]-[15].

49 *Thorne v Kennedy* (2017) 263 CLR 85 at 100 [31].

50 *Thorne v Kennedy* (2017) 263 CLR at 100 [32].

found that the primary judge had correctly held that Ms Thorne was deprived of free choice because of a combination of six matters:

i. her lack of financial equality with Mr Kennedy;

ii. her lack of permanent status in Australia at the time;

iii. her reliance on Mr Kennedy for all things;

iv. her emotional connectedness to their relationship and the prospect of motherhood;

v. her emotional preparation for marriage; and

vi. the "publicness" of her upcoming marriage[51].

As to unconscionable conduct, the plurality observed that the equitable doctrine can vitiate a transaction where the innocent party is "subject to a special disadvantage 'which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests'"[52]. The same circumstances which led to the finding of undue influence pointed "inevitably" to the conclusion that she was subject to a special disadvantage. Ms Thorne's special

---

51 *Thorne v Kennedy* (2017) 263 CLR at 106 [47], 110 [59].

52 *Thorne v Kennedy* (2017) 263 CLR at 103 [38].

disadvantage had been known to, and in part created by, Mr Kennedy[53].

Immediately you notice that in applying equitable principles in cases of intimate relationships – family law cases – the relevant facts and circumstances may be, and in this case were, different from those in commercial or business contexts.

While *Thorne v Kennedy* related to the setting aside of financial agreements under s 90K, whether a financial agreement should be set aside can plainly be relevant to the application of the property settlement provisions of the *Family Law Act*. The property settlement provisions will not apply to property of the parties covered by a valid and binding financial agreement entered by them[54]. Thus, if all the parties' property is covered by a financial agreement affected by vitiating circumstances it must be set aside for s 79 to have any work to do. Further, if a financial agreement *is* set aside, and a property settlement order is subsequently sought, *Stanford* requires that the first step in the analysis is to determine whether it is "just and equitable" to make such an order, identifying the *existing* legal and equitable interests of the parties[55]. Put another way, in setting aside a financial agreement affected by vitiating factors, a court alters the

---

53 *Thorne v Kennedy* (2017) 263 CLR at 112 [64]-[65].

54 *Family Law Act*, s 71A.

55 *Stanford v Stanford* (2012) 247 CLR 108 at 13 [37], 14 [39].

existing legal and equitable interests of the parties and re-establishes the starting point for the s 79 analysis.

Outside the context of *Family Law Act* financial agreements, *Hsiao v Fazarri*[56] provides another, even more recent, illustration of the importance of vitiating circumstances to ensuring that the *existing* property interests of the parties are correctly ascertained for the purposes of s 79(2).

In that case, prior to marriage, the husband had gifted the wife a 10 per cent interest in a property purchased for $2.2 million (which was later valued at over $3 million)[57]. About eight months later, while the husband was in hospital being treated for a suspected heart attack, and while under "pressure" from the wife, the husband signed a transfer of land giving the wife a further 40 per cent interest in the property[58]. Over two months later, when the husband was no longer under pressure, the transfer was registered and, shortly after that, a deed of gift was executed which provided for the transfer of half the value of the property to the wife if the husband predeceased her[59]. The parties then entered a marriage which lasted for 23 days

---

56 *Hsiao v Fazarri* (2020) 270 CLR 588.

57 *Hsiao v Fazarri* (2020) 270 CLR 588 at 598 [18], [20].

58 *Hsiao v Fazarri* (2020) 270 CLR 588 at 594 [1].

59 *Hsiao v Fazarri* (2020) 270 CLR 588 at 594 [1].

and, following their separation, each party sought property settlement orders.

The primary judge made orders, affirmed by the Full Court, for the wife to transfer to the husband the *whole* of her interest in the property, and for the husband to transfer $100,000 to the wife[60]. The effect of the order was that the wife's interest in the property was reduced to well below 50 per cent. In the High Court, a key issue was what should be made of the 40 per cent transfer of property which occurred under "pressure".

The majority (Kiefel CJ, Bell and Keane JJ) said that the primary judge had taken as the starting point that the husband and wife were joint tenants in the property, and that the significant reduction in the wife's interest was "just and equitable" according to the ordinary application of the property settlement provisions of the *Family Law Act*[61]. Further, their Honours said that the primary judge's failure to make a "close examination of the facts to determine whether the transfer of the 40 per cent interest was voidable by reason of vitiating factors such as duress, undue influence or unconscionable conduct" could be explained on the basis that the primary judge's reasons

---

60 *Hsiao v Fazarri* (2020) 270 CLR 588 at 594 [2]-[3].

61 *Hsiao v Fazarri* (2020) 270 CLR 588 at 607 [45].

"reflected the arguments that were put to him"[62]. The majority dismissed the appeal[63].

The minority, consisting of Justice Nettle and I, did not accept that the primary judge approached the matter on the footing that the wife was a joint tenant in the property[64]. Instead, we treated the wife's interest as joint tenant as affected by the "pressure" she had allegedly asserted. We concluded it was not open on the evidence to find that that pressure was sufficient to vitiate the property transfer[65]. We observed that "where a transaction is sought to be impugned by the operation of vitiating factors … it is necessary for a trial judge to conduct a 'close consideration of the facts … in order to determine whether a claim to relief has been established'"[66].
We concluded that because the primary judge had not expressly conceived of the case as one of undue influence, there was no good basis to disregard the wife's 40 per cent interest in the settlement of property under s 79[67].

---

62 *Hsiao v Fazarri* (2020) 270 CLR 588 at 609-610 [53].

63 *Hsiao v Fazarri* (2020) 270 CLR 588 at 596 [8].

64 *Hsiao v Fazarri* (2020) 270 CLR 588 at 610 [55].

65 *Hsiao v Fazarri* (2020) 270 CLR 588 at 610 [55].

66 *Hsiao v Fazarri* (2020) 270 CLR 588 at 617 [70], citing *Thorne v Kennedy* (2017) 263 CLR 85 at 104 [41], *quoting Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 400 [14].

67 *Hsiao v Fazarri* (2020) 270 CLR 588 at 617-618 [70]-[71].

The particular outcome in *Hsiao* may be put aside. The case, however, provides a pertinent example of how vitiating circumstances, and the adducing of evidence necessary to establish such circumstances – or lack of them – can be significant in whether equity has a role in determining the parties' existing property interests in property settlements and in providing judges with the necessary facts to make a just and equitable order (as well as providing a fault line along which majority and minority reasons divide).

No less significant, is the large role for equity in determining *existing* property interests in property settlement proceedings where people outside the marriage are involved – especially where people operate businesses through structures like discretionary trusts or in ill-defined broader family arrangements[68]. Equity also becomes particularly significant for determining existing property interests when one spouse is made bankrupt[69]. Put simply, as between a spouse and family or business associates or a bankruptcy trustee equity remains important in determining the *existing* assets on which s 79 then operates.

---

68 See *In the Marriage of Stein* (1986) 11 Fam LR 353 at 357-358, quoting *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 at 354-355; *Kennon v Spry* (2008) 238 CLR 366 at 390-391 [64]-[65], 407-408 [125]-[126]. See also *Family Law Act*, s 90AE, which relevantly provides the court with the power to make orders under s 79 which bind third parties.

69 See *Family Law Act*, s 79(1)(b); *Bankruptcy Act 1966* (Cth), s 59A. See generally Sarmas and Fehlberg, "Bankruptcy and the Family Home: The Impact of Recent Developments" (2016) 40 *Melbourne University Law Review* 288.

Moving away from equity's role in ascertaining existing property interests for the purposes of s 79, equity also plays a further role in the application of s 79 in that flexible notions of good conscience, fairness and real justice[70] have informed the determination of when it will be "just and equitable" to make a property settlement order under s 79(2).

That is well illustrated by the case of *Stanford*. There, after the husband and wife had lived together for 37 years, the wife suffered a stroke, was admitted into full time residential care and later developed dementia[71]. The wife's daughter, acting as case guardian, sought orders that the matrimonial home be sold and the net proceeds be divided equally between the husband and wife[72]. The High Court found that the order sought was not justified in circumstances where the separation of the parties was not voluntary (it was caused by the wife's dementia), where the wife had never expressed any wish to divide marital property while competent, and where "[i]t was not

---

70 See, eg, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474; *Thorne v Kennedy* (2017) 263 CLR 85 at 117 [78]; *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 57 [145], 58-59 [150], [152].

71 *Stanford v Stanford* (2012) 247 CLR 108 at 113 [7].

72 *Stanford v Stanford* (2012) 247 CLR 108 at 113 [8].

shown that the wife's needs during her life were not being or would not be met"[73].

In this sense, the Court did not apply discrete equitable doctrines, such as those which were at play in *Thorne* and *Hsiao*. Nevertheless, the Court gave effect to the phrase "just and equitable" in s 79(2) in a way which achieved the real justice of the case in a more general sense.

It should be added that the potential for the "just and equitable" requirement in s 79(2) to incorporate, or be informed by, equitable principles has not been fully explored[74]. The Court in *Stanford* observed that the expression "just and equitable" does not admit of exhaustive definition; it is not possible to chart its metes and bounds[75]. But we know, at the very least, that the question of whether it is "just and equitable" to make a property settlement order begins with identifying the existing legal *and equitable* interests of the

---

73 *Stanford v Stanford* (2012) 247 CLR 108 at 124 [49]; see also 119-120 [34], 124 [50].

74 See Parkinson, "Why are Decisions on Family Property So Inconsistent?" (2016) 90 *Australian Law Journal* 498 at 523; Turnbull, "In Metes and Bounds: Revisiting the Just and Equitable Requirement in Family Property Settlements" (2018) 31 *Australian Journal of Family Law* 159 at 163-164. See also *In the Marriage of Schokker and Edwards* (1986) 11 Fam LR 446 at 448-449; *Kennon v Spry* (2008) 238 CLR 366 at 399 [95].

75 *Stanford v Stanford* (2012) 247 CLR 108 at 120 [36], 123 [46].

parties in the properties[76]. As such, since *Stanford*, family lawyers have needed to engage more closely with the existing interests of parties in their property in relation to *each other* (and in relation to other relevant non–parties), rather than simply identifying the parties' property and assuming that s 79 orders would be made after they separated.

Those are just a few examples of where equitable principles have been and are considered by family courts in property settlement cases – others include:

(1) the existence of a constructive trust in respect of matrimonial property[77];

(2) estoppel, precluding reliance on the terms of a financial agreement[78]; and

(3) the application of volunteer principles in relation to a child who sought equity's assistance to complete an otherwise imperfect gift of property from a parent[79].

---

76 *Stanford v Stanford* (2012) 247 CLR 108 at 120 [37], 121 [39].

77 *Khalif & Khalif* [2021] FamCAFC 123 at [8]-[14]. See also *Khalif & Khalif* [2020] FamCA 39 at [235], [238]-[239].

78 *Guild v Stasiuk* (2020) 63 Fam LR 322 at 440-441 [467], 442-444 [478]-[479]. See also *Khalif v Khalif* [2020] FamCA 39 at [238].

79 *Selen v Selen* (2013) 49 Fam LR 164 at 178-179 [65], 187-188 [102]. See generally, North and Fuller, "Family Law Meets Equity", speech delivered at Foley's List Family Law Breakfast,

As the presumption of advancement was to be argued in a matter before the Court neither the presumption of resulting trust nor the presumption of advancement is addressed.

All of this is to make good the proposition that modern equity, increasingly, can and does play a role in the application of the property settlement provisions of the *Family Law Act*. As cases like *Thorne v Kennedy* show, that role is usually to "soften", or perhaps preserve, the effect of the legislative scheme. And equity does so in a way which is flexible and adapted to the peculiar circumstances of the case.

Against that background, there are three observations to be made about the role of equity in property settlement.

Historical irony

The first observation is that an increased role for equity in property settlement is somewhat of an historical irony. The irony is that, originally, one objective of statutory intervention in property settlement was to address that equity, and the law of trusts in particular, was seen to be *inadequate*; in particular, it had been described as "an imperfect tool with which to achieve economic

---

29 August 2018 at 6 [21], citing *Tory v Jones* (1990) DFC 95-095.

justice for the homemaker spouse on the breakdown of marriage"[80]. Statute was intended to remedy some of equity's shortcomings– particularly in relation to the recognition of non-financial contributions to property.

Common intention constructive trusts offered some scope to recognise non-financial contributions to property. As Mason CJ, Wilson and Deane JJ explained in *Baumgartner v Baumgartner*[81], where parties have pooled their earnings for the purposes of their joint relationship, and "[t]heir contributions, *financial and otherwise*, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship" (emphasis added), the assertion by one party that the property is his solely "amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust". But even then, constructive trusts required proof of an intent which could be evidentially elusive[82].

---

80 Young et al, *Family Law in Australia*, 9th ed (2016) at 790 [12.9].

81 (1987) 164 CLR 137 at 149.

82 Parkinson, "Why are Decisions on Family Property So Inconsistent?" (2016) 90 *Australian Law Journal* 498 at 511. See also Sarmas, "Trusts, Third Parties and the Family Home: Six Years Since *Cummins* and Confusion Still Reigns" (2012) 36 *Melbourne University Law Review* 216 at 219-220; Jacobs, *Law of Trusts in Australia*, 8th ed (2016) at 275 [13-52].

The potential unfairness which could result for those who made primarily (or entirely) non-financial contributions prior to a relationship breakdown required legislative attention. Any suggestion that that unfairness might have been resolved through incremental judicial decision-making was rejected by Dixon CJ in *Wirth v Wirth*, who said that "the title to property and proprietary rights in the case of married persons no less than in that of unmarried persons rests upon the law and not upon judicial discretion"[83].

The *Matrimonial Causes Act 1959* (Cth) was, for spouses, the first step in a legislative response to equity's perceived failings. Section 86(1) of that Act relevantly provided that the court could make "such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case". The *Matrimonial Causes Act* did not contain the "checklist" of considerations now contained in ss 79(4) and 75(2); the meaning of "just and equitable in the circumstances of the case" was left for judicial interpretation.

Relevantly, in *Sanders v Sanders*[84], Barwick CJ, with whom McTiernan J agreed, said that "in an appropriate case, although one of the parties has no legal or equitable right to property vested in the

---

83 (1956) 98 CLR 228 at 232. See also *Hepworth v Hepworth* (1963) 110 CLR 309 at 317.

84 (1967) 116 CLR 366 at 376, 379.

other, or to any greater interest in property than is already wholly or partially vested in him or her, the Court hearing the matrimonial cause may make orders settling that property on that one or increasing the beneficial interest of that one in property already wholly or partially vested in him or her as the case may be. 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".

Still, there was no *express* legislative basis for saying that a non-financial, or homemaker, contribution could give rise to property rights. And "[t]he emerging consensus by the early 1970s, was that contributions to the welfare of the family *should* be understood as indirect contributions to the property acquired in the course of the marriage" (emphasis added)[85]. This "emerging consensus" was ultimately reflected in s 79 of the *Family Law Act*[86].

In the second reading speech for a predecessor Bill to the *Family Law Act*, the Attorney-General said that under the legislative scheme contained in the Bill, applications for the division of

---

85 Parkinson, "Why are Decisions on Family Property So Inconsistent?" (2016) 90 *Australian Law Journal* 498 at 512.

86 On whether the enactment of s 79 broke from, or was a continuation of, trusts law jurisprudence, see and compare Dewar, "Contributions Outside Marriage", paper presented at the 10th National Family Law Conference conducted by the Family Law Section of the Law Council of Australia, 17-20 March 2002 at 2-4; Parkinson, "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 *Federal Law Review* 1 at 21. See also *Dickons v Dickons* (2012) 50 Fam LR 244 at 248 [14].

matrimonial property would be based on similar principles to those applying to maintenance applications, but that there would also be "a *positive provision* that the court *shall* take into account the contribution made to the acquisition of the matrimonial property by either party, in the capacity of homemaker or parent" (emphasis added)[87]. That positive provision was s 79(4)(b) of the *Family Law Act*, which provided that: in considering what property settlement orders should be made in a given case, a court "shall" take into account, among other things, "the contribution made directly 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*" (emphasis added)[88].

As Dr Nygh observed in the first edition of his *Guide to the Family Law Act 1975*[89], the enactment made it "quite clear" that "the court should permit a wife to earn her share in the matrimonial home *technically* owned by the husband by taking account of her work in running the household, judging her contribution both in a direct way by cleaning and repairs as well as in an indirect way by

---

87 Australia, Senate, *Parliamentary Debates* (Hansard), 3 April 1974 at 641.

88 The s 79(4) factors were reformulated by s 36 of the *Family Law Amendment Act 1983* (Cth). The homemaker or parent contribution is now recognised in s 79(4)(c), untethered to any reference of property, which provides as follows: "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".

89 Nygh, *Guide to the Family Law Act* (1975) at 109-110.

freeing her husband from domestic duties, permitting him thereby to earn the money which is used to pay off the mortgage" (emphasis added). And, in pursuit of this objective, "the court is not bound by existing property interests of the parties but may actually *alter* them in its discretion" provided that doing so is just and equitable[90] (emphasis added).

If one *objective* of the *Family Law Act* was to alter (when required) the technical legal and equitable interests of parties, it is interesting to see that the pendulum is arguably now swinging back the other way. There was clearly a perceived need for legislative intervention by 1975 (if not earlier) to secure the appropriate recognition of non-financial, homemaker contributions in property settlement cases. Equity and the exercise of judicial discretion alone could not achieve that result. Yet, now, cases like *Thorne* and *Hsiao* show us that the straightforward application of the *Family Law Act*'s provisions have not been used, or may be unable, to protect the most vulnerable and powerless following relationship breakdown. Equity is sometimes needed to protect those who are unable to protect themselves.

Stepping back, one might ask whether in family law, statute and equity are in tension with one another. Is this an arm-wrestle in which one source of law must triumph over the other? Or is it a constructive dialogue, in which inevitable statutory gaps are filled in

---

90 Nygh, *Guide to the Family Law Act*, 1st ed (1975) at 109.

by equitable principles, and vice versa? These are questions I do not have the answer to but there are good reasons to hope it is the latter.

Practical implementation

The second observation to be made about the role of equity in family law is practical and pragmatic. It relates to the fact that most families that separate resolve their property issues without recourse to family law courts.

The reference to "family law courts" in a general sense, is not intended to ignore that in September 2021, the administration of the Family Court of Australia and the Federal Circuit Court of Australia were brought together by the *Federal Circuit and Family Court of Australia Act 2021* (Cth)[91]. This was a significant reform – a change or shift – which provides, for the first time, a single, consistent pathway for family law litigants in federal courts[92]. For present purposes, the observations about the role of equity in family law which follow apply equally to both divisions of the Federal Circuit and Family Court of Australia and to its predecessor courts exercising family law jurisdiction.

---

91 See *Federal Circuit and Family Court of Australia Act 2021* (Cth), s 6.

92 Australia, House of Representatives, *Federal Circuit and Family Court of Australia Bill 2019*, Explanatory Memorandum at 3 [8], 18 [58].

It has been reported[93] that nearly 60 per cent of property settlement disputes are resolved without any use of lawyers, counselling, mediation, family dispute resolution services or the courts[94]. Courts are required to resolve property settlement disputes in about 7 per cent of matters[95]. And of the matters which do enter the family court system, the vast majority of them settle. In the 2020–2021 financial year, 72 per cent of Family Court applications were for consent orders; only 17.8 per cent of finalised applications proceeded to judgment[96]. In the newly established Federal Circuit and Family Court, the current Central Practice Direction for family law

---

93 Qu et al, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years*, Australian Institute of Family Studies (2014) at 98; ALRC, *Family Law for the Future – An Inquiry into the Family Law System: Final Report*, Report No 135 (2019) at 79 [3.1]; Joint Select Committee on Australia's Family Law System, *Improvements in Family Law Proceedings*, Interim Report (2020) at 12-13 [2.6]-[2.7].

94 In parenting matters, resolution is reached 52.6 per cent of the time by discussion and 19.1 per cent of the time by nothing specific, it just happened. In property matters, resolution is reached 39.3 per cent of the time by discussion and 18.8 per cent of the time by nothing specific, it just happened: Qu et al, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years*, Australian Institute of Family Studies (2014) at 54, 98.

95 Qu et al, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years*, Australian Institute of Family Studies (2014) at 98; Joint Select Committee on Australia's Family Law System, *Improvements in Family Law Proceedings*, Interim Report (2020) at 12-13 [2.6]-[2.7].

96 Family Court of Australia, *Annual Report 2020-2021* (2021) at 15-16. In the same year, in the Federal Circuit Court, 70 per cent of matters resolved prior to trial. Family law filings made up 92 per cent of Federal Circuit Court filings in 2020–21: Federal Circuit Court of Australia, *Annual Report 2020-2021* (2021) at 2, 21.

case management explicitly encourages parties to resolve their disputes without filing at all or, post-filing, without a judge needing to deliver a judgment[97].

Why is all this important? Because it means that the vast majority of family law disputes involving property settlement resolve *without* adjudication by a judge – *without* a binding decision on the application of the *Family Law Act* to the facts of the case. These disputes are resolved in the "shadow of the law".

The "shadow of the law" was a phrase used by Mnookin and Kornhauser in 1979 to explain "the impact of the legal system on negotiations and bargaining that occur *outside* the courtroom" (emphasis in original)[98]. They viewed "the primary function of contemporary divorce law not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their [post-dissolution] rights and responsibilities"[99]. Much has been written since 1979 on the

---

97 Federal Circuit and Family Court of Australia, "Central Practice Direction – Family Law Case Management" (2021) at cll 3.8, 3.9, 3.13.

98 Mnookin and Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 950 at 950.

99 Mnookin and Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 950 at 950.

usefulness of the shadow of the law as an explanatory concept[100]. It has been argued, for instance, that the shadow of the law is most relevant where legal proceedings are imminent or where legal advice has been received and is less relevant otherwise[101]. It has also been argued that people do not bargain in the shadow of *positive* law – the law contained in formal legal sources – so much as they bargain in the shadow of *folk* law – being, an understanding of the law that parties gain from a multiplicity of formal and informal sources[102]. And, as there is no single source of folk law, "[t]here may be multiple

---

100 See, eg, Wade, "Forever Bargaining in the Shadow of the Law – Who Sells Solid Shadows? (Who Advises What, How and When?)" (1998) 12 *Australian Journal of Family Law* 256; Dewar and Parker, "The Impact of the New Part VII Family Law Act 1975" (1999) 13 *Australian Journal of Family Law* 96; Batagol and Brown, *Bargaining in the Shadow of the Law? The Case of Family Mediation* (2011); Feigenbaum, "Bargaining in the Shadow of the 'Law?' – The Case of Same-Sex Divorce" (2015) 20 *Harvard Negotiation Law Review* 245; Crowe et al, "Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolution" (2018) 40 *Sydney Law Review* 319.

101 Wade, "Forever Bargaining in the Shadow of the Law – Who Sells Solid Shadows? (Who Advises What, How and When?)" (1998) 12 *Australian Journal of Family Law* 256; Batagol and Brown, *Bargaining in the Shadow of the Law? The Case of Family Mediation* (2011) at 192-4.

102 Crowe et al, "Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolution" (2018) 40 *Sydney Law Review* 319 at 332, 335.

shadows being cast on different parties, who may therefore approach the process with contrasting or conflicting expectations"[103].

Despite the nuance which has been (rightly) injected into shadow of the law discourse, Mnookin and Kornhauser's core thesis continues to have application in Australian family law today. Family law must speak to multiple fora and to multiple actors, including non-lawyers[104]. As the Productivity Commission observed in its 2014 report on *Access to Justice Arrangements*, "[g]iven that very few family law disputes are resolved through the courts, there is value in ensuring that those seeking to resolve disputes outside the courts have a reasonable degree of clarity about what the law is and what their entitlements are"[105]. One question that arises is this: if equity is increasingly softening the application of the *Family Law Act* in property settlement cases decided by courts, does equity cast a shadow? Does equity provide any protection at all for the majority of separating couples who resolve their property disputes outside of the

---

103 Crowe et al, "Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolution" (2018) 40 *Sydney Law Review* 319 at 335.

104 Dewar, "Can the Centre Hold?: Reflections on Two Decades of Family Law Reform in Australia" (2010) 24 *Australian Journal of Family Law* 139 at 147-148; Fehlberg and Sarmas, "Australian Family Property Law: 'Just and Equitable' Outcomes?" (2018) 32 *Australian Journal of Family Law* 81 at 102.

105 Fehlberg and Sarmas, "Australian Family Property Law: 'Just and Equitable' Outcomes?" (2018) 32 *Australian Journal of Family Law* 81 at 103, quoting Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) at 873.

family courts? Unfortunately, the answer appears to be that it does not and cannot.

Another question which might be asked is whether the *Family Law Act* casts a shadow on separating couples who resolve their property disputes outside of family courts. The Act is large and complex, and many of its provisions, like s 79, confer broad discretions on family law judges. The outcome of the application of the Act might therefore be difficult for separating couples – indeed, difficult for lawyers – to predict. Whether the *Family Law Act* is able to meaningfully provide clarity to parties about the law and their entitlements in property settlement is a large question, and one which will not be addressed further[106]. It is enough to note that whatever shadow *is* cast by the *Family Law Act*, it is unlikely to be touched by the softening effect of equity.

Consider where equitable vitiating factors, such as undue influence and unconscionable conduct are at play. The very premise of a finding of undue influence is that one person was deprived of free choice in the sense that his or her will was subordinated to the will of another person[107]. Similarly, a finding of unconscionable

---

106 See Fehlberg and Sarmas, "Australian Family Property Law: 'Just and Equitable' Outcomes?" (2018) 32 *Australian Journal of Family Law* 81 at 93. See also [0]-[65] below on recent law reform proposals.

107 *Johnson v Buttress* (1936) 56 CLR 113 at 123, 134, 139, 142-143; *Thorne v Kennedy* (2017) 263 CLR 85 at 99-100 [31]-[32], 118-119 [83]-[87].

conduct requires an innocent party to be subject to a "special disadvantage" which "seriously affects the ability of the innocent party to make a judgment as to [their] own best interests"[108]. It is difficult to see how a person in a property settlement dispute, who is subject to undue influence or a special disadvantage, could derive any benefit from the "shadow" cast by equitable doctrine. That is especially the case where the level of net assets in dispute is low[109] and the vulnerable party does not have legal representation. Indeed, the very reason why judicial intervention may be desirable in these kinds of cases is so that courts can use equity to protect people who are not able to protect themselves[110].

And, even where there are no vitiating factors, it is by no means clear that equity can influence or guide the bargaining positions of separating parties in the way that legislation or the common law can. Equitable principles seek to take a "comprehensive view" of "every connected circumstance" to determine the "real

---

108 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 424-425 [117]-[118]; *Thorne v Kennedy* (2017) 263 CLR 85 at 103 [38], 125 [109]-[111].

109 See Qu et al, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years*, Australian Institute of Family Studies (2014) at 104.

110 *Thorne v Kennedy* (2017) 263 CLR 85 at 100 [31], citing Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (1836), vol 1, 243.

justice" of a case[111]. But the "real justice" of a case is inherently subjective[112]. That is especially true in family law, which "engages with areas of social life and feeling – namely love, passion, intimacy, commitment and betrayal – that are themselves riven with contradiction or paradox"[113]. In a property settlement context, separating parties may take different views of fairness and "real justice" depending on their personal values, expectations of the relationship, and disappointment over the relationship's end[114]. And if the parties have taken markedly different views of the real justice of the case, there is limited (if any) scope for the shadow of equity to play a role in dispute resolution outside of the courts. "Cases cannot be settled in the shadow of the law if the law casts little shadow"[115].

---

111 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 426 [122]-[123]; *Thorne v Kennedy* (2017) 263 CLR 85 at 105 [43]; *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 49 [120], 58-59 [150].

112 Qu et al, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years*, Australian Institute of Family Studies (2014) at 112; Fehlberg and Sarmas, "Australian Family Property Law: 'Just and Equitable' Outcomes?" (2018) 32 *Australian Journal of Family Law* 81 at 94.

113 Dewar, "The Normal Chaos of Family Law" (1998) 61 *Modern Law Review* 467 at 468.

114 Qu et al, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years*, Australian Institute of Family Studies (2014) at 112; Fehlberg and Sarmas, "Australian Family Property Law: 'Just and Equitable' Outcomes?" (2018) 32 *Australian Journal of Family Law* 81 at 94.

115 Parkinson, "Why are Decisions on Family Property So Inconsistent?" (2016) 90 *Australian Law Journal* 498 at 523.

This arguably creates two tiers of justice in the family law system. One tier administered by family law courts, which apply the law and give full effect to the Act and equitable doctrines where relevant to achieve real justice in the circumstances of each case. In the other tier, the tier comprising the majority of family law disputes, disputes resolve with very little scope for the Act, let alone equity. In other words, the same game is being played with two sets of rules, creating at least some risk of inconsistency and inequality in outcomes.

This is not a new problem, nor one which is easily solved. Part of the answer may lie in new initiatives like the Priority Property Pool 500 ("PPP500") pilot. The pilot was first rolled out in four registries[116] of the Federal Circuit Court of Australia in early 2020, aimed at providing a quicker and simpler process for distributing property of less than $500,000 following a relationship breakdown[117]. Management of a PPP500 case includes a registrar-led limb – where a judicial registrar can assist separating couples to reach agreement in the shortest time possible – and a judge-managed limb – where a procedurally simpler process is applied to the determination of disputes[118]. In August 2021, the Federal Circuit and Family Court

---

116 Brisbane, Parramatta, Adelaide and Melbourne.

117 Joint Select Committee on Australia's Family Law System, *Improvements in Family Law Proceedings*, Second Interim Report (2020) at 25.

118 Federal Circuit and Family Court of Australia, *Guide for Practitioners and Parties in Priority Property Pools under*

reported that 75 per cent of PPP500 cases were disposed of by registrars without the need for any judicial involvement, less than 5 per cent of cases needed a significant hearing before a judge, and even when cases were referred to judges, they were well prepared and easier and quicker to deal with[119].

In a similar way, part of the answer (to a two-tiered system of family law justice) may lie in the use of technology and alternative dispute resolution.

For example, in June 2020, National Legal Aid and the Legal Services Commission of South Australia, with support from the Australian Government, launched the online platform "amica", designed to assist separating couples with family and property disputes[120]. For property settlements, parties identify the pool of

---

$500,000 (PPP500) Cases <https://www.fcfcoa.gov.au/pubs/fl/ppp500-guide>.

119 Joint Select Committee on Australia's Family Law System, Final Report (2021) at 10 [1.34]. An alternative approach to facilitating resolution of family disputes is shown by a family mediation scheme established by the UK Government under which funding was allocated to provide "vouchers for mediation services – each worth £500 – with the aim of finding amicable solutions to couples' disagreements and freeing up space in the family courts": see UK Government, *Press Release: Family Mediation Scheme to Help Thousands More Parents* (16 January 2022), available at <https://www.gov.uk/government/news/family-mediation-scheme-to-help-thousands-more-parents>.

120 National Legal Aid, *amica: Terms of Use*, available at <https://amica.gov.au/terms-of-use>; Attorney-General's Department, *amica – An Online Dispute Resolution Tool*, available at <https://www.ag.gov.au/families-and-

assets to be divided, and then amica uses artificial intelligence to calculate how to divide the assets fairly, taking into account circumstances that a court would consider in making property settlement orders[121]. Parties can then either accept the recommendation of amica and record their agreement with it or use the recommendation as a starting point for future dispute resolution[122].

This is not to assume or imply that more property settlement disputes should end up in dispute resolution or in courts. If anything, the initial success of the PPP500 pilot shows us that the opposite might be true. My intention is merely to observe that the *issues* raised in property settlement proceedings are varied and the intersection between equity and statute in family law can be complex. And, any attempt to achieve greater consistency and equality in family law outcomes must be practical and pragmatic and must recognise that there are two tiers in the family law system – one

---

marriage/families/family-law-system/amica-online-dispute-resolution-tool>.

121 National Legal Aid, *amica: How it Works: Money and Property*, available at <https://amica.gov.au/how-it-works/money-and-property>.

122 On the use of digital pathways in Australian family law generally, see Fehlberg and Smyth, "Digital Pathways in Australian Family Law: An Initial Snapshot", in Maclean and Dijksterhuis (eds), *Digital Family Justice: From Alternative Dispute Resolution to Online Dispute Resolution?* (2019) 179.

administered by family law courts and one where disputes are resolved outside the Act and the courts.

Law reform

The third – and final – observation to be made concerns law reform and the future. In recent years, there have been numerous[123] significant reports on the Australian family law system, including on the operation of the property settlement provisions of the *Family Law Act*. Against the background of the matters already discussed, it is timely to consider what place, if any, *equity* has in these reports and the calls for reform contained within them.

(1) It is useful to start with the Productivity Commission's September 2014 report on access to justice arrangements, which relevantly recommended that the property provisions in the *Family Law Act* should be reviewed "with a view to clarifying how property will be distributed on separation"[124]. The recommendation was intended to address, in part, the

---

123 For a comprehensive summary of inquiries into the family law system since the *Family Law Act* was enacted, see ALRC, *Family Law for the Future – An Inquiry into the Family Law System*, *Final Report*, Report 135 (2019) at 66-77 [2.38]-[2.92].

124 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) at 874 (Recommendation 24.4).

cost of obtaining professional advice and dispute resolution for low-value family property disputes[125].

(2) Next, the House of Representatives Standing Committee on Social Policy and Legal Affairs reported in December 2017 on how Australia's federal family law system can better support and protect people affected by family violence[126]. Among other things, the House Committee recommended that the impact of family violence explicitly be taken into account in property settlement[127] and that an early resolution process for small property settlement matters be introduced[128].

(3) In 2019, the ALRC published the first comprehensive review of the *Family Law Act* since 1980[129] following the release of a discussion paper which asked 33 questions and made 124

---

125 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) at 870.

126 House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) at 1 [1.1].

127 House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) at 216 [5.67] (Recommendation 13).

128 House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) at 178-179 [5.67]-[5.70] (Recommendation 14).

129 ALRC, *Family Law for the Future – An Inquiry into the Family Law System*, *Final Report*, Report 135 (2019) at 29-30 [1.1]-[1.2].

proposals for change[130]. In relation to property settlement, the ALRC made two recommendations: first, to "*specify the steps* that a court will take when considering whether to make [property settlement orders]; and *simplify the list of matters* that a court may take into account when considering whether to make [property settlement orders]"[131]; and second, to include in the *Family Law Act* "a presumption of equality of contributions during the relationship"[132]. Significantly, in March 2021, the previous Government agreed to the first of these recommendations, although it reserved its position on the final formulation of any amended statutory language[133].

(4) Finally, over the course of 2020 and 2021, the Joint Select Committee on Australia's Family Law System published a series of reports on a range of issues. The second interim report, in March 2021, contained recommendations on property settlement directed to financial disclosure, the impact of family violence and the use of binding financial

---

130 ALRC, *Family Law for the Future – An Inquiry into the Family Law System*, *Final Report*, Report 135 (2019) at 489-515.

131 ALRC, *Family Law for the Future – An Inquiry into the Family Law System*, *Final Report*, Report 135 (2019) at 218 (Recommendation 11).

132 ALRC, *Family Law for the Future – An Inquiry into the Family Law System*, *Final Report*, Report 135 (2019) at 218 (Recommendation 12).

133 Australian Government, *Government Response to ALRC Report 135: Family Law for the Future – An Inquiry into the Family Law System* (2021) at 17.

agreements[134]. And the final report, in November 2021, recommended expanding the PPP500 program to all Federal Circuit and Family Court registries and recommended committing further funding to that program, subject to a positive evaluation[135].

The reports mentioned are significant in number, comprehensive, and informed by qualitative and quantitative research. They credibly identify various aspects of the family law property settlement regime that could be changed. Reccurring themes in the recommendations relate to clarifying and simplifying the property settlement provisions of the *Family Law Act*, explicitly providing more guidance on how property will be distributed on separation, improving access to the family law system for those with low-value property disputes, accounting for family violence, accounting for the best interests and care arrangements of children, and accurately and efficiently identifying the financial contributions of parties to a relationship.

At least some of the recommendations made in the reports mentioned have already been achieved. For instance, the recently established Federal Circuit and Family Court of Australia. The merger

---

134 Joint Select Committee on Australia's Family Law System, *Improvements in Family Law Proceedings*, Second Interim Report (2021) at 104 [4.133], 105 [4.118], 108 [4.128], 109 [4.133] (Recommendations 21-24).

135 Joint Select Committee on Australia's Family Law System, Final Report (2021) at vii [1.38]-[1.39].

between the Family Court and Federal Circuit Court sought to remedy the problems inherent in a fragmented family law jurisdiction, which was a concern identified in each of the reports mentioned[136]. Indeed, in introducing the Federal Circuit and Family Court of Australia Bill 2019 to Parliament, the then Attorney-General identified the House Committee report as one of a number of "substantial inquiries over the last decade" which had been influential[137]. In that report, the Committee had urged the "adoption of a single point of entry to the federal family law courts so that applications, depending on the type of application and its complexity, are appropriately triaged, and actively case managed to their resolution in an expedited time-frame"[138].

On the other hand, though, several reform recommendations from these reports relating to aspects of the family law property settlement regime have not – or have not *yet* – been implemented. One obvious example is that the government is yet to amend the

---

136 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) at 866; House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) at 154-155 [4.254]; ALRC, *Family Law for the Future – An Inquiry into the Family Law System*, *Final Report*, Report 135 (2019) at 37 [1.27]; Joint Select Committee on Australia's Family Law System, Final Report (2021) at 2-3 [1.9]-[1.10].

137 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 5 December 2019 at 7054.

138 House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) at 154 [4.254].

Family Law Act to specify and simplify the steps a court should take when making property settlement orders, as recommended by the ALRC[139].

The focus on the *court* is interesting – is the *Family Law Act* for the courts and those who use the courts? Or is it for the families that resolve their property issues without recourse to family law courts? And are the steps that are needed to be taken different for the two groups? And if so, is it necessary to specify and simplify the steps the parties can take to settle property settlement disputes, outside the courts in the Act or elsewhere?

Further, notice that no amendment has been proposed in any of these reports to address or account for the increasing role of equity in property settlement proceedings. It may be that no such amendment is necessary. It may be that specifying and simplifying the process for the making of property settlement orders would be enough. It is not appropriate to offer a view on the *merits* of the reports or their recommendations. My objective is more modest: to acknowledge that some amendment to the property settlement provisions of the *Family Law Act* seems increasingly likely[140]. The important remaining questions are when and how. And, in light of that reality, to

---

139 Australian Government, *Government Response to ALRC Report 135: Family Law for the Future – An Inquiry into the Family Law System* (2021) at 17.

140 See Fehlberg, Sarmas and Morgan, "The Perils and Pitfalls of Formal Equality in Australian Family Law Reform" (2018) 46 *Federal Law Review* 367 at 368.

encourage reflection on the role that equity might play in property settlements.

Conclusion

Future amendment of the *Family Law Act* might lead to a *decline* in the influence of equity in *some* aspects of property settlement proceedings. This could follow if the existing laws are clarified and simplified, leading to more predictable judicial outcomes and, in turn, better guidance for parties negotiating property settlements without resort to the family courts[141].

Equally, equity may *remain* influential, or become even *more* influential, despite well-intentioned attempts at legislative reform. I say that for two reasons. First, the nature of present-day legal structures and relationships – sometimes complex, sometimes ill-defined and often both – that were not part of the legal landscape in 1975 when the *Family Law Act* was enacted, or at least were not as common or complex. That is significant. Equity's role in determining – resolving – existing property interests as between a

---

141 See Parkinson, "Why are Decisions on Family Property So Inconsistent?" (2016) 90 *Australian Law Journal* 498 at 511; ALRC, *Family Law for the Future – An Inquiry into the Family Law System*, *Final Report*, Report 135 (2019) at 196 [6.6], 199 [6.18]. cf New Zealand Law Commission, *Review of the Property (Relationships) Act 1976*, Report 143 (2019); New Zealand Government, *Government Response to the Law Commission Report: Review of the Property (Relationships) Act 1976* (2019).

spouse and family or business associates or a bankruptcy trustee is critical, important and difficult and is likely to become more so.

Second, and relatedly, profound social changes have occurred since the *Family Law Act* was enacted in 1975[142]. Today, for instance, "[m]ore women are the primary earners in their families or at least work full-time; more women bring assets into second and third relationships; and the law now applies to couples in de facto relationships who may have kept their assets and incomes largely, if not entirely, separate"[143]. Also, as a result of rising prices in property markets, spouses and de facto partners who are able to buy a home are increasingly purchasing property "with the assistance of other family members, usually parents, or alternatively, living in properties for long periods for which they are not the registered proprietor"[144]. These social changes have had legal consequences which were not predictable or predicted in 1975.

Similarly, it is not possible to predict the social changes that will occur in *next* 10, 20 or 30 years. Indeed, we are still in the early stages of understanding the impact of the last *two* years of the COVID-19 pandemic on families and the family law system in

---

142 ALRC, *Family Law for the Future – An Inquiry into the Family Law System*, *Final Report*, Report 135 (2019) at 29 [1.2].

143 Parkinson, "Why are Decisions on Family Property So Inconsistent?" (2016) 90 *Australian Law Journal* 498 at 523-524.

144 North and Fuller, "Family Law Meets Equity", speech delivered at Foley's List Family Law Breakfast, 29 August 2018 at [7].

Australia. We have already seen the establishment of a COVID-19 list by the Federal Circuit and Family Court and a rise in applications filed in that list related to vaccinations in the family context[145]. But it may be years before we fully understand possible links between the pandemic and family *separation*, and, by extension, links between the pandemic and *property division* following separation. To the extent that the *Family Law Act*, either in its current form or following amendment, is unable to keep up with social changes in the coming decades, equity may continue to have a role to play.

That is not to overlook that equity may have a role to play in addressing unequal and unjust aspects of society that have *not* changed in recent decades and may *not* change in the years to come. The family law system in Australia operates against the background of a socio-economic context in which there are disproportionate poverty rates for women and children, and adverse economic consequences of separation and divorce for women, particularly women with dependent children[146]. As Professor Fehlberg and Lisa

---

145 Federal Circuit and Family Court of Australia, "Family Law Practice Direction – National COVID-19 List"; Koob, "Family courts to expand COVID-19 priority list as virus-related disputes soar" (Sydney Morning Herald) 19 December 2020, available at <https://www.smh.com.au/national/family-courts-to-expand-covid-19-priority-list-as-virus-related-disputes-soar-20201219-p56owm.html>.

146 Australian Council of Social Services, *Poverty in Australia 2020: Part 2 – Who is affected?* (2020) at 35-36, 55. See also Hunter, "Decades of Panic" (2005) 10 *Griffith Review* 53; de Vaus et al, "The Economic Consequences of Divorce in Australia" (2014) 28 *International Journal of Law, Policy and the Family* 26 at 41-42.

Sarmas have previously observed, "this overall pattern has not changed since the 1980s, the consistent finding in Australia (and other western countries, including the United Kingdom) being that 'the financial impact of divorce is greater for women than it is for men'"[147]. Identifying and understanding this context is not only critical for those involved in legislative reform of the *Family Law Act*, but also for informing the role we might expect equity to play, or continue to play, in family property settlements in future.

All that is certain is that family law in Australia will continue to engage with areas of life which are passionate, (at times) chaotic, and contradictory[148]. And, despite the best efforts of those responsible for law reform, there might continue to be the possibility of unfairness in property settlement disputes, and a corresponding need for equity to intervene to remedy that unfairness.

At least in one sense, regardless of whether the most important work for equity to do in property settlements is to respond to the future consequences of social change, or to make inroads into unjust

---

147 Fehlberg and Sarmas, "Australian Family Property Law: 'Just and Equitable' Outcomes?" (2018) 32 *Australian Journal of Family Law* 81 at 88, quoting Fisher and Low, "Recovery from Divorce: Comparing High and Low Income Couples" (2016) 30 *International Journal of Law, Policy and the Family* 338 at 339 (other citations omitted). See also Hunter, "Decades of Panic" (2005) 10 *Griffith Review* 53.

148 Dewar, "The Normal Chaos of Family Law" (1998) 61 *Modern Law Review* 467 at 468, 484-485.

aspects of society that have remained the same for many decades, similar themes and questions emerge:

- What is the legal system *trying to achieve* when property settlement orders are made following the end of a relationship?

- What is the starting point for that analysis?

- Is it the parties' *contributions* to the relationship, be them financial or non–financial, direct or indirect or a community of property style approach[149]?

- Is it the *future needs* of the parties or dependent children following the relationship breakdown?

- Is it the position of the parties if the relationship had not ended – the "gap in expectations"[150]?

- Or is it a mix of one or more of these questions?

Asking, and at least attempting to answer, these questions is critical because the starting point that is chosen will inevitably have consequences for the outcome that is reached. And the outcome

---

149 See Parkinson, "Family Property Division and the Principle of Judicial Restraint" (2018) 41 *University of New South Wales Law Journal* 380.

150 cf *Preston v Preston* [2021] 1 NZLR 651.

that is reached is one which is real. The division of property affects real people in the real world, at a difficult time in their lives, against the background of the social structures and relationship norms which prevail from time to time. In a just and functioning system, the division of property between real people in the real world should not be determined by two sets of rules – one for the courts and another for outside the courts – creating at least some risk of inconsistency and inequality in outcomes.

It will be fascinating and worthwhile to pay close attention to the next chapter of changes to the Family Law system and the Family Law Act and, in those contexts, to the discourse between statute and equity in family law; whether that discourse be an arm-wrestle, a reluctance to engage at all, or an ongoing and constructive dialogue.