
The farmer and his wife

(Hey ho the dairy goes)

Malcolm Voyce

When farm marriages fail should husband and wife receive an equal share of the family farm?

In November 1992 a Joint Select Committee (JSC) of the Australian Parliament handed down a report on the *Family Law Act 1975*.¹ While the press ran stories about the report's recommendation that a 50/50 division of property be a starting point for Family Court property proceedings, little media coverage was given to the recommendations concerning the division of the family farm following divorce.

In short, the JSC recommended that the *Family Law Act 1975* be amended to enable the Family Court to distinguish farming properties from other matrimonial property so that, in addition to other matters, the court is able to consider:

- whether the farming property was brought into the marriage by one or other party or whether it was acquired by both parties and developed after the marriage;
- the necessity for the retention of a farming property as an income-producing unit for the future needs of the separating family.

It is clear from the *Family Law Act* that the same provisions currently apply regardless of the nature of the property or the financial resources of the parties. This approach was reaffirmed by the Full Court in *Lee Steere v Lee Steere* (1985) FLC 91-626 at 80,076.

One instrumental reason advanced by the JSC for treating farming land differently was that a farm includes not only a dwelling but a business so that, should an order be made, the future productive capacity of the farm could be affected and the farmer could be deprived of his or her income and means of earning a livelihood (JSC 11:46). The sale of a farm may be the result in many cases as often farms are highly mortgaged and the male farmer has little room to move financially towards raising more money. Furthermore, both the older and younger generations could suffer as retiring parents may still depend on the farm for income while younger children may be deprived of the opportunity of inheriting the farm.

More fundamental to the JSC's reasoning seemed to be the 'greater emotional element' in proceedings relating to rural properties as against other forms of property. Frequently farms have been in the family for several generations and great attachment has built up towards the property which represents not only an income but a way of life. In many cases there is a perception that the land is a 'kind of trust or as if an entail - to be passed on to oncoming generations'.^{1a}

The claim that farmers and their farms should be given special consideration is based on beliefs about the nature of family farming and the intrinsic values of its people and their way of life. In the political context farmers have long espoused the idea that they are a group deserving special consideration in the form of state protection or subsidies.²

This article explores the full significance of the JSC recommendations about family farming specifically:

- the position of rural women and the gendered division of farm work;
- the relevance of agrarian ideals or 'country-mindedness' on which the JSC seems to base its recommendations;
- the legislative background to these recommendations;
- the case law up to the Full Court's landmark decision of *Lee Steere v Lee Steere*; and
- the implications of these recommendations.

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The position of rural women in Australia

Farm families have a distinct rural ideology where farming is seen as a male vocation of honest hard work in a situation where self-reliance and independence are valued.³ Rural life is portrayed as a constant struggle against a hostile nature which has historically been seen as a man's realm where women became background figures in the landscape.⁴

Women are usually regarded as farm hands and helpers rather than farmers.⁵ They are frequently invisible despite their legal status as equal partners and their significant labour contribution. However, women's paid and unpaid labour is important in assessing family income especially in periods of economic recession.

Women who marry farmers (particularly non-rural women) in many cases are in a difficult position. They frequently are not told about the web of feudal-like arrangements of which they will soon become part. They may be marrying an agricultural labourer, rather than the 'inheriting son' should a father not leave the son the farm in his will. Moreover, the transfer of the farm itself might be delayed until the daughter-in-law 'settles down' as the parents may be fearful of transferring the farm until the relationship seems stable.

On many farms women are pressured to fit the confines of family tradition where there is a strong ideal that the farm stay in the family. In this process women have traditionally been regarded as vessels (or conduits), typically only receiving a life estate.⁶

One recent survey of farming women confirmed the persistence of very conservative attitudes concerning men and women's work in rural areas. The main feature of this is the prevailing ideology of farming as men's work and the high degree of the involvement of farm women in their husband's job or the family farm. Women frequently saw themselves as 'farm hands' or as 'helping out' even where they worked all day on the property.

Moreover many women are responsible for the housework and child minding while their husbands play little role in this area. To support the family, many women take on jobs while they receive little help in the home.⁷

The JSC's view of the rural community

The claim that farm property should be treated differently from other types of matrimonial property rests on the assumption that farming property and the farming way of life is somehow special. This claim echoes high-minded claims concerning the values of the farmers' work ethic, independence, self-integrity and farmers' harmonious co-existence with nature.

Aiken suggests that these attitudes which he calls 'country-mindedness' are no longer dominant.⁸ Important factors in their decline according to Aiken were the growth of manufactured exports over rural exports, and post-war immigration to Australian cities rather than farms. These immigrants had no Arcadian view of rural life. Finally there has been the relative decline of farming incomes as thousands of farmers since the 1960s have left the land.

Recently, it has been claimed that there is some scattered evidence to show that these bucolic attitudes are 'alive if not abundantly well' and certainly that some farming families see themselves as distinctly different with special problems.

Aiken has claimed that country-mindedness is an ideology 'which may have a future as part of the romantic past, but that

has ceased to have power in the practical present'. However, as the JSC seems to embrace the idea of family farming and the intergenerational devolution of property within the family, the committee is supporting the patriarchal notion of male inheritance of land and the notion that women are inherent dependants.

I suggest the vision of land holding in Australia that the JSC seems to be building on presents an oversimplistic and stereotypical view of Australian farming. First, fewer farms are now passed down through the generations. It appears few farms remain in a family for more than three generations. A survey in the mid-1960s in Western Australia found that for farms over 405 hectares only 15% of the farmers had been reared on the property they were currently farming. In another survey in 1979-81, amongst wheat growers in Southern Australia, it was found that only one-third of farm families had a grandparent on the property they were farming.⁹ Second, many parents do not want their children to continue with what many see as a 'mugs' game'.¹⁰ Many children do not want to continue farming and their parents actively try to educate them to give them 'better opportunities'.

While it is true that many farms which have been in a family for several generations might have to be sold to finance a settlement on dissolution, there is no discussion in the report on the effect of this on the assessment of the women's contribution. The question arises why the contribution of women should be disregarded to allow for the perpetuation of a farm thus leaving intact male patriarchal values and ideals.

Legislative background to the recommendations

The general thrust of the 1975 Act is that men and women, so far as possible, should be financially independent. The philosophy of the Act as regards property and maintenance is to give the parties a clean break.

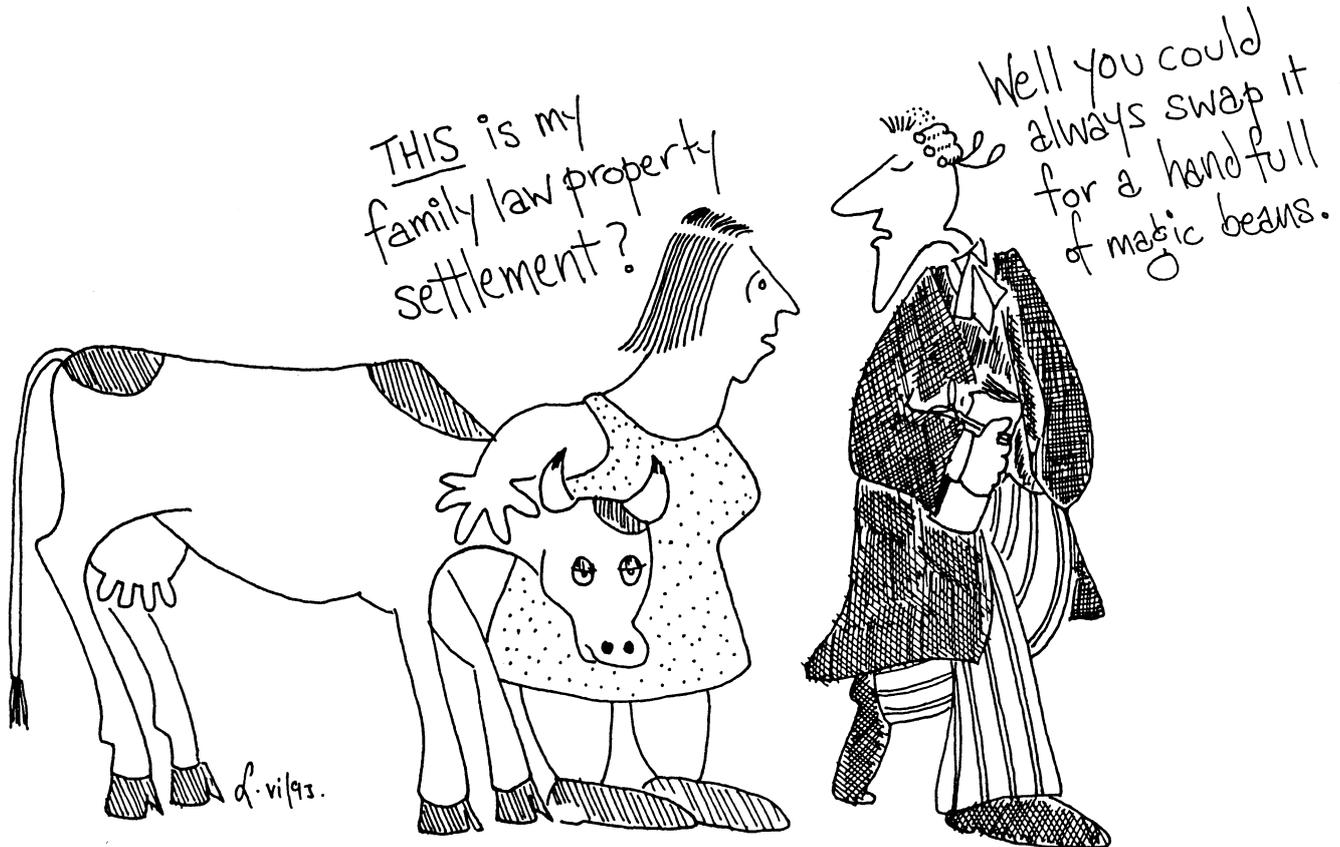
Under s.79(4) of the *Family Law Act* the court has a broad discretion to alter property interests taking into account a wide variety of factors:

- (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 . . .
- (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 . . .
- (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;
- (d) the effect of any proposed order upon the earning capacity of either party to the marriage.

Gifts and inheritances

Common patterns are for a son to inherit a farm after working on it for a number of years; or for parents to buy another farm for a son. Women rarely inherit farms to become the sole managers or to work farms by themselves.

It is clear that inherited property is considered part of the property subject to division by order of the court. By bringing an inheritance into a marriage, a party is regarded as making a contribution to the pool of assets to be divided.



One of the principal factors of interest to the court in this context is the timing of the gift. Gifts received early in a marriage may not be taken away from the spouse who received the gift, in the event of an early separation. However, the longer the duration of the marriage the 'more the proportionality of the original contribution is reduced'. Thus by the passage of time the 'gift' is offset by the possible contribution of the other spouse. Therefore, where a gift is received late in a marriage even after separation it is very difficult for the spouse to claim a share of that gift based on contribution.

Contributions towards household and farm

While the court may divide the property as it thinks fit, the discretion must be exercised according to the factors set out in s.79 (as well as ss.75 and 81).

During the late 1970s there was a presumption that property should be divided equally. This 'equality is equity' approach was overturned by the High Court in *Mallet v Mallet* (1984) 156 CLR 605 as it was regarded as placing a fetter on the exercise of judicial discretion which was not authorised by the *Family Law Act*.

Under s.79(4)(a) and (b) it was recognised that contributions to the property may be financial or non-financial and may be direct or indirect. The contributions may be to acquisition conservation or improvement of the property.¹¹ What constitutes a 'contribution' to the property of the parties? It is clear from s.79(4)(a) and (b) that money, materials and physical labour can all constitute a contribution to the property?¹² The notion of contribution has been extended to include any act or advantage which has economic significance.

It is now clear following a 1983 amendment (s.79(4)(c)) that the contribution as a 'homemaker' and parent may be regarded as contributing in a substantial way to the value of

property. This gives recognition to the position of a housewife who by her work in the home frees the husband to earn income and acquire assets.¹³

Section 79(4)(c) requires the court to take into account contributions by a spouse to the welfare of the family. This section is different in the sense that it does not solely concern contributions to property but contributions of a domestic nature such as support by way of cooking for the family, caring for the children and providing encouragement and support. It is acknowledged that financial contributions can also add to the welfare of the family.

Generally the domestic activities of one spouse are regarded as contributing towards property acquired during the marriage. However, the Family Court has adopted a different approach in the case of business assets (such as farms).¹⁴ For example, in *Mallet v Mallet*, Mason J held:

the property in issue consists of assets acquired by the party whose ability and energy has enabled the establishment or conduct of an extensive business enterprise to which the other party has made no financial contribution and where the other party's role does not extend beyond that of homemaker and parent. [at 625]

The implication of this approach is that if a wife devotes her life to homemaking and children to enable the husband to build up a business, she may never qualify as an equal in the distribution of the business assets.¹⁵ In the case of a farm, the usual approach was that a judge would look at the farming assets as opposed to domestic assets and assess the contributions to each in their respective spheres.

I note later in this article how *Lee Steere v Lee Steere* is now authority for the fact that a judge will regard as equal the contributions of a wife as homemaker and parent as against those of a farmer running the farm.

Section 79(4)(d) and *Lee Steere v Lee Steere*

Section 79(4)(d) requires the court to take into account the effect of an order on the earning capacity of either party,¹⁶ but it is one of several factors to be considered in order to arrive at a just and equitable order. Therefore if the court can frame an order for periodical instalments or postpone the order it will do so if there is no injustice to the parties (*Lee Steere v Lee Steere* (1985) FLC 91.626). This consideration has been especially important where a farm is the major asset or where a farmer knows no other means of making a living.

Some early decisions had held that land that was used for farming purposes and that was essential to the production of an income is in a different category from land which simply provided a place for the family home.¹⁷

A different approach was adopted in *Magas v Magas* [1980] FLC 9-0885 when it was stated that:

If arrangements can be made which would relieve the spouse who is working on a farm as a farmer, from selling the farm but at the same time doing proper justice to the claim of the spouse, who is not living on the farm, then of course those arrangements should be made . . . [However] if there is no other way to do that which is just and equitable then a sale must take place.

In 1985 came *Lee Steere v Lee Steere*.¹⁸ In affirming the approach of *Magas v Magas* the Full Court indicated an important new direction when it made clear there is no 'farming case' exception to the ordinary principles applicable under s.79 of the Act. Their Honours said:

The fact that the subject of property proceedings under s.79 is a farm may give rise to considerations as to the way and means by which a property division should be effectuated . . . But there is no farming case exception to the ordinary principles applicable, under s.79 of the Act . . . By the same token it is wrong to approach a farm case on the basis that the wife should only receive an amount which adequately meets her needs without considering first her entitlement by way of contribution . . . We must therefore reiterate that in relation to farming properties, as in relation to all other assets be they business assets or suburban land, the ordinary principles of s.79 of the Act apply. [at 80,076-80]

It is now clear that farms do not have any special status in property proceedings. First, the same principles of s.79 apply, whether, as in the case of *Lee Steere*, where the farm was inherited by the husband, or whether it had been acquired by one of the parties prior to the marriage. The fact that a farm has been in the family for several generations does not give it special status. Second, no special consideration will be given to farmers whose only life experience has been working on farms and who have to 'sell up' and face unemployment on the sale of the farm. Third, seen as a practical matter where a wife is deemed to have made a substantial contribution to a farm, because of the frequency of high debt levels and the inability to sell off part of the farm it would appear that it is difficult to avoid a sale of the farm.

The Lee Steeres were married in 1975. The husband had brought into the marriage a property which had belonged to his father. The husband acquired this property in 1965. Another property was also brought into the marriage which previously had been owned by other members of the family and which came to be jointly owned by the husband and his wife. As a matter of fact the judge decided the husband brought into the marriage these two properties while the wife brought in \$2000.

The husband ran the farm while the wife reared the children and ran the home. Occasionally the wife helped on the farm when this was required.

The Full Court recognised the importance of the husband bringing into the marriage the pre-marital assets so 'that party is to that extent making a contribution which cannot be matched by the party who brings few if any assets into the marriage' (at 80,078).

As regards the various contributions of the wife and those of the farming husband, the court found that they were equal in their respective spheres as each party carried out his and her responsibilities equally as 'partners' and that 'within their own particular and agreed sphere of activity during the period of their marriage their contributions ought to be treated as equal' (at 80,079).

However, the final judgment awarded the wife, despite the apparent equality of contributions, only 20% of the value of the farm while the husband received 80%, the disparity being due to the inherited nature of the property rather than the equality of the contributions.

The conclusion to be drawn from the outcome of *Lee Steere* is that the contributions of a wife as a homemaker and parent may be regarded as equal to a husband who manages and runs a farm, where both spouses started off with equal contributions to the farming enterprise. However, where a husband brings major assets into a marriage, in general, the wife may only receive less than half the amount of the value of the assets.

Implications of the recommendations

The recommendation by the JSC that farming property ought to be treated differently from other matrimonial property seems to be based on two factors. First, the farm should be preserved against a forced sale or overwhelming debt. Second, special regard should be had 'where the farm was inherited and there was an expectation that the farm remains in the family for several years to come' (JSC 11.47 and 11.1).

The first recommendation which follows from this is that the *Family Law Act* be amended to distinguish farm properties from other matrimonial property so that the court can take into account 'whether the farming property was brought into the marriage by one or other party or whether it was acquired by both parties and developed after the marriage'.

This is hardly a new suggestion and indeed represents a standard approach by the courts to determine the degree to which the proportionality of the inheritance contribution was reduced by the respective contribution of the other spouse. This recommendation, in reality, endorses the 'asset by asset approach' to calculate the relative contributions of the parties.¹⁹ This approach can of course create problems of tracing and identification of assets as they may be replaced in the course of the marriage.²⁰

What is more far-reaching is the recommendation that the court has to take into account the necessity of preserving the farm as an income-producing unit for the future needs of the separating family. This approach is surprising given the *Lee Steere* decision and its endorsement by the Australian Law Reform Commission report in 1987.

I suggest the position of women on farms is sufficiently devalued to give concern as the law stands. Even under *Mallet* the difficulty is for women to prove that their contributions in the 'domestic' realm were equal to the man's in his 'farming' realm. The man, in most cases, inherited property and thus had the advantage of having this credited as a contribution. The rule that 'gifts equal contributions' has meant that women

get on average only 25%-30% of farming property settlements on divorce. However, surprisingly there has been no debate over this rule which in a situation where men usually inherit farms has led to the reproduction of male patriarchy on farms.

However, the JSC recommendation even further attempts to restrict women obtaining a fair share of the farm following divorce as the recommendation attempts to turn the clock back to the pre-*Lee Steere* stage where farming properties were put into a category different from other matrimonial property and thus preserved as a productive unit for male farmers. Following this approach, the wife's claim from the pool of assets would be restricted to her respective share of the domestic assets.

This recommendation must, by most views, be seen as a retrograde step. It makes a difference between urban and rural women. It would perpetuate the existing pattern of reproduction of farms based on male patriarchal notions. This leaves women's labour devalued and renders their contributions invisible.

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