CASE NOTES

THE DISTRIBUTION OF PROPERTY PURSUANT TO SECTION 79 OF THE FAMILY LAW ACT 1975 (CTH): MALLET v MALLET[1]

THE BACKGROUND

Section 79 (1) of the *Family Law Act* (Cth) affords a court exercising jurisdiction pursuant to the Act, the discretion to alter the interests of the parties to a marriage, in respect of "the property of the parties, or either of them". Additionally, in section 79 (2), the court is directed that an order is not to be pronounced in respect of section 79 unless it is "just and equitable" to do so. Thus, the wording of sub-section (2) confers an extremely wide discretion upon the court to alter interests in property. Additionally, this provision appears to place some onus upon the party seeking to alter the existing status quo.[2] This "justice and equity" requirement is applicable, not only to the content of the order, but further, to the ability of the court to pronounce an order at all. Furthermore, in order to assist the court in relation to an application pursuant to section 79 of the Act, section 79 (4) provides a number of matters which the court is compelled to take into account in the exercise of its discretion. These matters include, direct or indirect financial contribution, non-financial contribution, the role of a party as a homemaker and parent,[3] the effect of any proposed order upon the earning capacity of either party and any of the matters referred to in section 75 (2).[4] The legislation does not provide that the matters listed in section 79 (4) are to be exclusively the issues which the court is permitted to consider. In fact, the intention of the parties in relation to property, or benefits received therefrom has been held to be a relevant matter in relation to section 79 applications,[5] yet this intention does not appear to fall within any of the categories in section 79 (4).

The recent High Court decision in *Mallet's*[6] case focused upon the determination, in financial terms, of the role of the wife in a long marriage,

[1] (1984) F.L.C. 91-507.
[2] *Rogers* and *Rogers* (1980) F.L.C. 90-874.
[3] This aspect is now, (since the amendments to the *Family Law Court* 1975 (Cth) of November 1983), provided for in section 79 (4) (c) which has put simply in legislative form, what had previously been established by the case law.
[4] Section 75 (2) provides a list of matters to be taken into account with respect to maintenance applications.
[5] *Crawford* and *Crawford* (1979) F.L.C. 90-647.
[6] (1984) F.L.C. 91-504.

as a homemaker and parent and whether there is any presumption of equality in respect of a section 79 application. The case law[7] since the inception of the *Family Law Act* has clearly established that one party's role as a parent and homemaker is a matter to be taken into account pursuant to section 79 (4). In fact, the Chief Justice, in the matter of *Rolfe*[8] stated:

> "A husband and a father is free to earn income, purchase property and pay off the mortgage so long as his wife assumes the responsibility for the home and the children. Because of that responsibility, she may earn no income or have only small earnings, but provided she makes her contribution to the home and to the family, the Act clearly intends that her contribution should be recognised not in a token way but in a substantial way."

The amendments of November 1983, now have included, in section 79 (4) (c) the contribution of a party as a homemaker or parent. This legislative amendment has simply recognized that the role of a homemaker and parent is to be taken into account as a substantial contribution in relation to property.[9] The contention and debate which culminated in the High Court's decision in *Mallet's* case stemmed from the statements pronounced in the Family Court as to a convenient starting point or "yard stick" in property applications.[10] Nygh J. in the matter of *Racine* and *Hemmett*[11] stated that there is a "general rule that where the parties have been married for a substantial time, and there have been contributions by each of the parties, there should be an equal division". However, it is imperative to note that there has been a distinction drawn in the cases between the matrimonial home and other assets, such as those pertaining to a business. For example, in the matter of *W* and *W*,[12] the wife received 50 per cent of the former matrimonial home and one third of the husband's business assets being his interest in a legal firm to which the wife had not directly contributed. By comparison, in the matter of *Marinko*,[13] the Full Court awarded the wife a substantial part of the equity in the matrimonial home and further half of the husband's medical practice as she had contributed to the husband's business as a receptionist and nurse.

Additionally, in the matter of *Albany*,[14] despite the fact that the parties had been married for over 20 years and that there were four children of the marriage, the wife received 30 per cent of the net assets which had been valued at in excess of 1.6 million dollars. The Full Court reached this conclusion by providing that in relation to a section 79 application,

[7] *Zappacosta* and *Zappacosta* (1976) F.L.C. 90-089.
[8] Id. 78, 273.
[9] *Wardman* and *Wardman* (1978) F.L.C. 90-466, *Potthoff* and *Potthoff* (1978) F.L.C. 90-475.
[10] *Potthoff* and *Potthoff* (1978) F.L.C. 90-475, 77, 446, as compared with *Dupont* and *Dupont (No. 3)* (1981) F.L.C. 91-103, 76, 765, *Aroney* and *Aroney* F.L.C. 91-709, 79, 789.
[11] (1980) F.L.C. 90-872. See also *Aroney* and *Aroney* (1979) F.L.C. 90-709.
[12] (1983) F.L.C. 91-307.
[13] (1982) F.L.C. 90-227.
[14] (1980) F.L.C. 90-905.

the court must embark upon a dual exercise. Firstly, the nature and extent of the property of the parties must be determined together with the relative contributions made. Secondly, the court is required to consider the elements of section 75 (2). The ultimate result in *Albany's* case was that on the facts, the court found that the wife had contributed in a substantial way to the husband's business and that the amount awarded did, and ought always, reflect a party's contribution in combination with his or her maintenance needs. The court further stated that the extent of the wife's entitlement in relation to business assets was to be regarded as something of significance independent of need.

Thus, where one party has contributed as a homemaker or parent, a clear approach had been enunciated by the Family Court in relation to the resolution of applications pursuant to section 79 in respect of long marriages.[15] The method employed has been to place all of the assets of the parties into the calculation and consider what each party has contributed to those assets by application of section 79 (4). The order resultant from this contribution test could then be varied by virtue of the needs of the parties.[16] It is imperative to note the order thus arrived at was not perceived as a maintenance order but a property order with a maintenance component.[17] This consideration of the needs of the parties has enabled the court to adjust the distribution of property as between the parties to a marriage without relying solely on those parties' respective contributions. With respect to the distribution of property pursuant to section 79, it is important to bear in mind that the Full Court of the Family Court stressed in *Carter* and *Carter*[18] that the court does not differentiate as to the manner of acquisition of a particular item of property or who of the parties, actually owns it. The correct approach is to apply the principles enunciated in sections 79 (2) and section 79 (4). One must stress that although the language of many decisions in the Family Court has appeared to expound a presumption of equality, the type of assets in question is a vital factor. The matrimonial home and business assets, for example, have been treated differently. Furthermore, although the decisions in certain cases have espoused an equal division of property, the ultimate order of the court, has in many instances not reflected this policy.[19]

MALLET v *MALLET*

On the 10th April 1984, the High Court of Australia delivered its judgment in the matter of *Mallet*. The husband had obtained special leave to appeal to the High Court from a decision of the Full Family Court which had

[15] There is no "magical figure" describing what is connoted by a "long" marriage but the issue has been judicially considered: *Pickard* and *Pickard* (1981) F.L.C. 90-034, *Hirst* and *Rosen* (1982) F.L.C. 91-230.
[16] *Tuck* and *Tuck* (1981) F.L.C. 90-021, *Noel* and *Noel* (1981) F.L.C. 91-035.
[17] *Pastrikos* and *Pastrikos* (1980) F.L.C. 90-897, *Lawrie* and *Lawrie* (1981) F.L.C. 91-102.
[18] (1981) F.L.C. 91-061.
[19] *Mahon* and *Mahon* (1982) F.L.C. 91-242, *Marinko* (1983) F.L.C. 91-307.

reversed the first instance decision of Bell J. The facts of the case were as follows. The wife applied pursuant to section 79 of the *Family Law Act* for an order altering the interests of the parties to the marriage in the property which they owned either individually or jointly. The parties were married for a period of twenty-nine years and there were three children of the marriage, each of whom, at the time of the trial was self-supporting. The assets of the parties were as follows: (a) jointly owned property, including the matrimonial home ($240,662); property owned solely by the husband ($261,077); a car owned by the wife ($5,700) and each of the husband and wife had a 26 per cent shareholding in the family company, which was valued at $86,996 for each party to the marriage. Thus the total value of the property, the subject of the wife's application, was $681,431.

At trial Bell J. pronounced that the wife should receive half of the value of the jointly owned property, the value of her shares, the motor car and 20 per cent of the value of the property owned by the husband, making a total of $260,000. His Honour further ordered that the husband indemnify the wife in respect of any liabilities existing in relation to the shares and of mortgages encumbering the jointly-owned property. Additionally, the husband was ordered to contribute $30,000 towards the wife's costs.

The wife appealed to the Full Court of the Family Court, comprising Emery and Simpson S.JJ. and Ross-Jones J. It was contended on behalf of the wife that in a long marriage, there is prima facie presumption of equality in a section 79 application. The wife's appeal was successful with the Full Court expounding the view that the trial judge had failed to give proper weight to various factors. The Full Court endorsed the view that equality was a convenient starting point where the marriage was a long one and the wife was awarded 50 per cent of all the assets and the figure of $335,000 was substituted for that of $260,000. The husband's cross appeal against the order in favour of the wife for costs, was refused.

Upon the husband's appeal to the High Court the majority (Gibbs C. J., Wilson and Dawson JJ. enunciated that the decision arrived at by the trial judge was within that judge's discretion and the appeal by the husband should be allowed. Mason and Deane JJ. dissented however. Both reduced the award granted to the wife from $335,000 to $310,000, as it was contended by the minority judges that the Full Court of the Family Court had failed to take into account the indemnity which the trial judge had granted to the wife in respect of the mortgage on the home of $25,000.00.

The case before the High Court involved four primary issues which were as follows: (a) the question of whether equality of interest ought to be a starting point in relation to long marriages: (b) the mode of valuation of the shares in the family company; (c) the costs awarded against the husband; and (d) the function of an appellate court. The only matter which caused contention and which caught the public eye and that of the media was the issue of whether equality of interest ought to be a starting point. Section 79 (4)'s application and the view of the court in this regard shall

be considered in detail. For the sake of completeness, the three other issues will briefly be adverted to. As to the question of the costs of $30,000 awarded against the husband, all five members of the High Court found that the trial judge's order, in this regard, was within the range of acceptable discretion. In so far as the valuation of the shares in the family company was concerned, evidence in this regard formed a large part of the trial. The evidence of three accountants was before Bell J. and each proferred a different means of valuation of the shares. The trial judge adopted the evidence of the husband's accountant which comprised a valuation on an earnings basis, save that the capitalization rate applied by Bell J. was increased by 5 per cent to 25 per cent to allow for the extremely high asset backing of the companies. The Full Court of the Family Court accepted the method of valuation of shares as adopted by the trial judge however reservation was expressed that insufficient weight had been afforded to the future capital growth of the family company. The wife did not cross-appeal in the High Court upon the question of share valuation. However, various dicta statements were pronounced which emphasize the difficulty of share valuations and the importance of the expert evidence of accountants. There is, however, nothing to suggest that the case establishes that the type of evaluation accepted by the trial judge in *Mallet's* case is applicable in every instance. So far as the matter of the function of an appellate court is concerned, the High Court approved of the views expressed in the *Australian Coal and Shale Employees' Federation* v *The Commonwealth*[20] and those proferred in *Gronow* v *Gronow*.[21] It was emphasized that the discretion of a trial judge ought not to be interferred with unless some error of law or fact has been made.[22]

THE ISSUE OF EQUALITY

That aspect of *Mallet's* case which has received immense publicity and which is pertinent to the commentary herein is the issue of whether in long marriages equality of interests in the property of parties ought to be regarded as a convenient starting point. The High Court unequivocally pronounced that there is no rule of law or presumption of equality in an application pursuant to section 79 of the *Family Law Act*, even in relation to a marriage which has had a considerable duration. All five members of the High Court were in agreement upon this issue save that Deane J. stressed that:

> "In each case, the Family Court must pay regard to the matters specified in section 79 (4) and determine whether it is just and equitable that any order be made and, if it is, what represents the appropriate order in the particular circumstances of the case before it. On the other hand, the circumstances of a particular case may well be such as to lead the

[20] (1953) 94 C.L.R. 621, 627.
[21] (1979) 144 C.L.R. 513, 519-520.
[22] *Mallet* v *Mallet* (1984) F.L.C. 91-507, per Gibbs C.J. at 79, 114 and per Mason J. at 79, 118.

> Family Court to conclude, as a matter of fact, that equality is an appropriate starting point in determining the particular order to be made under section 79."[23]

The other four members of the court emphatically denied the existence of any presumption of equality or starting point as being an encroachment upon the discretion permitted to the court pursuant to section 79 (2). The Chief Justice stipulated that:[24]

> "even to say that in some circumstances equality should be the normal starting point is to require the courts to act on a presumption which is unauthorized by the legislation. The respective values of the contributions made by the parties must depend entirely on the facts of the case and the nature of the final order made by the court must result from a proper exercise of the wide discretionary power whose nature I have discussed, unfettered by the application of supposed rules for which the Family Law Act provides no warrant."

It was further stated by Dawson J.[25] that

> "it does not follow in every case where the husband earns the family income and the wife carries out her responsibilities in the home that the contribution of each as to property acquired during cohabitation should be regarded as equal."

Thus the manifest view of four of the five members of the High Court in *Mallet's* case was that there is no presumption or starting point of equality in relation to the property of the parties, even in a marriage of long duration.

CONCLUSION

Despite the furore surrounding the decision in *Mallet's* case, it is respectfully submitted that the judgement, in reality does little to change the approach to the division of property between spouses. The manner in which one proceeds in relation to an application pursuant to section 79 has not altered. In determining an application for a property settlement, the court exercising jurisdiction is still required to consider the contribution of each party to the marriage to the "acquisition, conservation or improvement" of property. Once this initial factual analysis has been made having regard to the matters provided for in section 79 (4), the court is then empowered to vary this contribution test by consideration of the matters referred to in section 75 (2). In other words, a maintenance component can be incorporated into a property order.[26] That which is not permitted, as it is viewed by the High Court as a fettering of the discretion afforded to the court pursuant to section 79 (2), is to commence upon the presumption of equality. The High Court emphasized that each case is to be considered upon its own facts and by reference to the contributions and relative needs of the parties. The role of a party as a parent or

[23] Id. 79, 128.
[24] Id. 79, 111.
[25] Id. 79, 132.
[26] *Pastrikos* and *Pastrikos* (1980) F.L.C. 90-897, *Lawrie* and *Lawrie* (1981) F.L.C. 91-102.

homemaker has in no way been diminished and in the ultimate analysis, there is little doubt that many decisions will still result in an equal division of property as between spouses. One cannot however rely upon any prima facie presumption of equality, and to some extent the court may be constrained to employ different language to that used in cases such as *Wardman* and *Potthoff*[27] which proceeded upon the equality principle. However such cases, upon the application of the contribution test as delineated in *Mallet's* case, would most likely arrive at an identical result.

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[27] Supra fn. 9.

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UNLAWFUL AND DANGEROUS ACT MANSLAUGHTER: *R.* v. *WILLS*[1]

The defendant ("D") was out shopping with his de facto wife when he saw in the street his legal wife from whom he was separated. He went across to her and an incident occured in which he allegedly twisted her arm up behind her back.

The wife returned to her home in some distress and reported what had happened to her de facto husband, Scott ("S"). S then spoke to the wife's brother, Cornish ("C"), and the two of them decided to visit D at his home. On their arrival an altercation ensued during which S entered D's house and hit D in the eye. C pulled S away but as they were leaving C told D that they would be back to 'get' him later. C and S then left the house and got into their car which was parked a little way down the street. D took a rifle and went down to the bottom of his driveway. S and C were still sitting in their car on the opposite side of the road. D fired a shot which struck C killing him almost immediately.

D was charged with murder. He apparently believed that S was a dangerous type who used a gun and he claimed that he fired the shot not intending to hit anyone but to show S and C that he too had a gun and to scare them off from renewing their attack, which he said he believed they were about to do. The trial judge refused to allow self-defence to be left to the jury but he allowed them to consider provocation and he also directed them as to manslaughter by an unlawful and dangerous act. A question from the jury showed that they had found against murder and their subsequent verdict of manslaughter can only have been based on the unlawful and dangerous act doctrine.

D's appeal to the Full Court against conviction was dismissed, but what is of concern here is the treatment in the leading judgment of Lush J. of the issue as to the unlawfulness of D's act in firing the rifle. The theme of this commentary is that the courts have not always been as specific as they could be in identifying the particular unlawfulness of the act in question. The cases — e.g. *R* v. *Holzer*,[2] *R* v. *Lamb*[3] — make it clear that the act, for the purposes of unlawful and dangerous act manslaughter, must be unlawful in a criminal sense. This requirement necessarily involves that the act should constitute a specific offence in its own right and in order to do so it must satisfy all the technical elements in the definition of the offence. It is in regard to this latter requirement that the courts have on occasions left the unlawfulness of the act rather at large. The present case affords, I think, a useful illustration.

Once a jury has, as in the present case, negatived mens rea for murder and falls back upon manslaughter it obviously follows that in a case of

[1] [1983] 2 V.R. 201.
[2] [1968] V.R. 481.
[3] [1967] 2 Q.B. 981.