THE MORAL JUSTIFICATION FOR ALTERATION OF PROPERTY INTERESTS UNDER THE FAMILY LAW ACT

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I. INTRODUCTION

The power of the Family Court to alter the property interests of parties to a marriage is a formidable power. By section 79(1) of the Family Law Act 1975 (Cth) the Family Court "may make such order as it considers appropriate altering the interests of the parties in [their] property." In the exercise of this power the Family Court can go so far as to vest the entire property interests of one party to a marriage in the other party.[1] As Gibbs J. observed in *De Winter* v. *De Winter*:[2]

> the discretion confided to the Family Court to make orders affecting interests in property . . . is extraordinarily wide. Such orders may of course disturb existing rights; few curial orders can have a greater effect on ordinary citizens of modest means.[3]

The power of the Family Court to alter property interests is not however unfettered. In considering what order it should make under section 79(1), the Court is required by section 79(4) to take into account six considerations. Moreover, by section 79(2) the Court is required not to make an order altering property interests unless it is satisfied that in all the circumstances it is just and equitable to do so. It is now clear that by "just and equitable" in subsection 2 is meant just and equitable in light of the six considerations set out in subsection 4.[4] The six considerations in subsection 4 thus have a

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1 *In the Marriage of Collins* (1977) 30 FLR 93, 105.
2 (1979) 23 ALR 211.
3 *Id.*, 218.
4 *In the Marriage of McDougall (No.2)* (1976) 26 FLR 17, 24; *In the Marriage of W.* [1980] FLC 90-872, 75,528; *In the Marriage of Hannema* (1981) 54 FLR 79, 88; *In the Marriage of Hirst and Rosen* [1982] FLC 91-230, 77, 251.

controlling effect upon the exercise of the Court's power to alter property interests, and by virtue of this present the legal justifications for an alteration of property interests. The question for consideration in this article is whether behind these legal justifications is found any moral justification for altering the interests of spouses in their property after the breakdown of marriage.

II. THE SIX CONSIDERATIONS OF SECTION 79(4)

Upon an initial reading of section 79(4), the six considerations set out in the separate paragraphs of this subsection seem to have little in the way of a pattern behind them, save that the first three concern contributions by the parties to the marriage. In short, paragraphs (a) and (b) require the Court to take into account the contributions by the parties to property, and paragraph (c) requires the Court to take into account contributions made by the parties to the welfare of the family. Paragraph (d) requires the Court to have regard to the effect of any proposed property order upon the earning capacity of either party to the marriage, paragraph (e) requires the Court to take into account the fourteen maintenance considerations set out in section 75(2) of the Act, and paragraph (f) requires the Court to consider any other order made under the Family Law Act which affects either a party to, or a child of, the marriage.

A more careful examination of the six considerations of subsection 4, however, reveals that there is a basic pattern behind these various matters. The first three considerations are all clearly backward-looking. These concern the past contributions that have been made by the parties to the marriage. The other three all look to present and future circumstances of the parties. The Family Court has analyzed the scheme behind section 79(4) even more thoroughly still. In particular, it has perceived the final three considerations as being concerned not simply with the present and future circumstances of the parties but with their general economic position for the foreseeable future, and more especially with their general future maintenance needs. The majority of the Full Court of the Family Court explained the underlying two-fold aspect of section 79(4) in *In the Marriage of Sieling*,[5] when it observed that the provisions of this subsection:

> have both a retrospective and a prospective element. They look back to see how property was acquired, who contributed to it and in what form. They look ahead to ensure that the Court considers the means and needs of each spouse and of the children.[6]

An alteration of property interests under section 79 of the Act is thus justified in law either on account of the past contributions that have been

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5 (1979) 35 FLR 458.

6 *Id.*, 477. See also *In the Marriage of Tuck* [1981] FLC 91-021, 76,219; *In the Marriage of Lawrie* [1981] FLC 91-102, 76,749.
In the quotation in the text, the members of the Full Court did not refer to contributions to the welfare of the family as the provision on this matter was inserted into section 79(4) in 1983.

made by a spouse to property or to the welfare of the family, or by reason of a spouse's general future maintenance needs. The question accordingly arises whether these two broad considerations are proper bases for an alteration of property interests. Is there any good reason why past contributions to property or to the welfare of the family should justify an alteration of property interests? And should the general future maintenance needs be a ground for altering property interests?

III. JUSTIFICATION OF THE CONTRIBUTION CONSIDERATIONS OF SECTION 79(4)

Although the first three considerations of section 79(4) are similar in that they are all backward-looking and concern past contributions by the parties to a marriage, they concern contributions to two quite different things. Paragraphs (a) and (b) concern contributions to property, whilst paragraph (c) concerns contributions to the welfare of the family. As will be seen, it is not difficult to justify contributions to property as a basis for an alteration of property interests. Contributions to the welfare of the family, however, present problems.

Section 79(4)(a) and (b) requires the Court to take into account, in short, all contributions of every kind that the spouses have made to their presently owned and previously owned property. These contributions may be either direct or indirect. They may be to the acquisition, conservation or improvement of property. And they may be financial (paragraph (a)) or non-financial (paragraph (b)). But why should all of these contributions justify an alteration of property interests? In particular, why should voluntary contributions to the conservation or improvement of property justify an alteration of property interests between spouses and not between strangers?

A consideration of the position between strangers is instructive. Suppose a man should live in a house owned by a friend and that whilst he is there he makes certain improvements to the property. Suppose he follows the example of Mr Pettit[7] in decorating the inside of the house, building a wardrobe in a bedroom, laying a lawn and constructing an ornamental well and a side wall in the garden. If he undertakes this work simply to please himself it cannot be argued that he has any moral claim to compensation, let alone a claim to an interest in the property. On the other hand, if he undertakes this work pursuant to an agreement with the owner, he clearly does have a moral claim to compensation. Apart from where there is an agreement or understanding with the owner of property, and apart from certain other situations, such as where contributions are made to property to save it from deterioration or destruction, a person is commonly regarded as

7 *Pettit* v. *Pettit* [1970] AC 777.

lacking any moral claim to compensation or an interest in property simply by virtue of voluntary contributions to the property.

For the most part, the rules of common law and equity reflect the principles which have been referred to. So, for example, an unsolicited contribution to property does not normally confer upon the contributor any right to compensation or to an interest in the property, the law of salvage being a rare exception to this rule.[8] Apart from salvage, there is no principle of *negotiorum gestio* known to our law. Equity recognizes a contributor to property as having an interest in the property if there was a common intention between the contributor and the owner that in return for the contributions the contributor would have a particular interest in this property. This is the *Allen* v. *Snyder*[9] type of express or implied trust, which is often incorrectly referred to in Australia, following a totally different line of English cases, as a constructive trust. There are also other situations in which equity recognizes a contributor to property as having an interest in the property. None, however, affects the general rule that an unsolicited contribution to property does not confer on the volunteer any right to compensation.

If voluntary contributions by strangers to property do not give rise to a claim to compensation, why should voluntary contributions by spouses be any different? The answer to this question and indeed the answer to the more general question of why all contributions by spouses to their property may properly be taken into account in determining an alteration of property interests upon the breakdown of marriage, lies in two distinctive features of married life. The first is that married life typically involves a sharing of property, and indeed a sharing of economic existence. The second is that marriage is intended by the parties to last for their joint lives. Its termination is not contemplated as a probable event. If parties to a marriage are even moderately intelligent, they will be aware that their union may break down, and they may even recognize the statistical probability that this will occur. But so far as the average spouses are concerned they marry for life, or at least for the indefinite future. Sir Jocelyn Simon referred to the first, and alluded to the second, of these distinctive features of marriage in his well-known lecture to the Holdsworth Club in 1964,[10] when he said:

> [w]hatever the law may say, most married people in fact live in community of goods. Their joint incomes are used for household purposes and for the upbringing of their children. They enjoy in common the occupation of the matrimonial home. They spend their joint savings in subsidizing their years of retirement together.[11]

If marriage, then, involves a sharing of economic existence, and this way of living is entered into on the basis that it will last for the parties' joint lives

8 *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 ChD 234, 248-249.
9 [1977] 2 NSWLR 685.
10 Published *sub nom.* *'With All My Worldly Goods . . .'* (1964).
11 *Id.*, 18.

or at least indefinitely, it would clearly be wrong for the parties to rely simply upon their ordinary legal or equitable property rights upon the premature breakdown of the marriage. This would be wrong because the rules of law and equity that constitute the law of property are for the most part unconcerned with the variety of economic arrangements that marriage can involve. The law of property is first and foremost a law for strangers. It is a law for individuals who enter into formal relationships in respect of property regardless of their personal relationship. It accordingly makes very few allowances for the fact that the parties are spouses, the presumption of advancement being a notable exception.[12]

Consider the position of a typical couple who marry on the basis that their marriage will last for their joint lives. As they do not contemplate the termination of their relationship other than by death, they will almost certainly arrange their mutual economic affairs without regard to the rules of law and equity. They may accordingly decide that the husband will make the mortgage repayments on the matrimonial home from his salary, and that the wife will purchase the food and other household supplies from her earnings. If an officious legal bystander were to point out to the couple the legal consequences of such an arrangement, they would in all probability be indifferent. If, for example, the mortgage were taken out by the parties jointly, it would not matter to the husband that he will gain no greater beneficial interest in the matrimonial home by making the whole of the mortgage repayments than by making just half of them.[13] Nor would it matter to the wife that she will not gain any interest in the former matrimonial home simply by spending money on household goods even if this thereby frees her husband's income to make direct financial contributions towards the acquisition of the home.[14] The parties would not be concerned with these legal consequences because it is not intended that their domestic relationship will come to an end other than by the death of one of them. When that happens the property interests of the survivor will be determined not simply, or even primarily, by the law of property but by the law of succession which will treat the surviving spouse with reasonable generosity. If, however, the marriage comes to an end prematurely by a breakdown in the marriage relationship, there is then a clear need for the mitigation of the strict rules that make up the law of property to take into account the distinctive features of marriage which have just been described.

In light of the foregoing, the particular reason why voluntary contributions by spouses to property may properly be recognized in an alteration of property interests can be appreciated. Although from a strictly legal point of

12 See note 9 *supra*, 690; *Napier* v. *Public Trustee* (1980) 55 ALJR 1, 3; *Calverley* v. *Green* (1984) 155 CLR 242, 247, 256.

13 See *Calverley* v. *Green id.*, 252, 257-258, 267-268.

14 *Robinson* v. *Robinson* [1961] WAR 56, 58.

view such contributions are made to property belonging to another, so far as the spouses themselves are concerned they are contributions to jointly owned property. As Sir Jocelyn Simon said in his lecture to the Holdsworth Club, "[w]hatever the law may say, most married people in fact live in community of goods."[15] If parties to a marriage treat their property as jointly owned during cohabitation, and if they intend that it will always be treated as jointly owned, it would be wrong after the breakdown of the marriage for the spouse who owns a particular piece of property not to compensate the other for the contributions made by that other whilst it was treated by both as owned in common.

The general argument that has been presented explains why it is justifiable to base an alteration of property interests upon the contributions that spouses have made to property during the course of their marriage. This argument does not, however, necessarily work the other way. It does not necessarily lead to the conclusion that contributions by spouses to property should be recognized by an alteration of property interests. The mere fact that parties to a marriage normally share their economic life, that they arrange their economic affairs on the basis that their relationship is permanent, and that the ordinary rules of law and equity do not often provide an appropriate basis for the division of property upon the premature termination of marriage, does not necessarily justify a law for an alteration of property interests such as is found in section 79 of the Family Law Act. The law might well say that those who enter into marriage should nonetheless be bound by the same rules relating to property as apply between strangers.

There is, however, a practical problem with the alternative approach just mentioned, for the law as it presently stands does not allow parties to a marriage to mitigate the effects of the ordinary law of property by entering into a legally binding agreement that will apply in the event of the premature end of their relationship. Such an agreement is deemed to be contrary to public policy, and therefore void, because it contemplates the possibility of separation between spouses.[16] It is not sufficient for present purposes that spouses are permitted to enter into a legally binding property agreement upon the breakdown of their marriage.[17] The judgment of the parties may then be affected by their emotions, for example by vindictiveness, desperation or despair, and this may lead to an unfair separation agreement. Alternatively, the relationship between the parties may be such that they cannot reach an agreement at all. Clearly if spouses cannot enter into a legally binding agreement concerning the distribution of their property in the event of marriage breakdown, and if there is no way in which the property can be distributed according to principles which are fairer than the ordinary rules of

15 Note 10 *supra*, 18.
16 *Fender* v. *St. John Mildmay* [1938] AC 1, 44.
17 *Hart* v. *Hart* (1881) 18 ChD 670.

law and equity, the institution of marriage will not be attractive to anyone who realizes that he or (more usually) she will be prejudiced in respect of economic contributions to the property of the parties in particular, and to the marriage relationship generally, if the marriage does not last for life.

IV. THE PROBLEM OF CONTRIBUTIONS TO THE WELFARE OF THE FAMILY

The justification of section 79(4)(c) presents problems. This paragraph requires a Court hearing an application for an alteration of property interests to take into account the contribution made by each spouse to the welfare of the family. This means that an alteration of property interests can be based on non-economic grounds. As Nygh J. said in *In the Marriage of Parker*:[18]

> [t]his paragraph refers to contributions which cannot be traced into the acquisition of wealth, but can best be seen as a claim for services rendered, such as keeping house, nursing, looking after children and the like.[19]

Before proceeding further the point should be made that paragraph (c) is not restricted to non-economic contributions. It can include financial contributions to the welfare of the family.[20] It can also include non-economic contributions to the welfare of the family, for example looking after the home or the children, which free the other spouse to make a contribution either to property under paragraphs (a) and (b) or to the financial welfare of the family under paragraph (c). Such apparently non-economic contributions to the welfare of the family clearly have economic significance by virtue of their economic consequences. The problem with paragraph (c), however, is that it can cover contributions to the welfare of the family that have no economic significance at all.

To the extent that contributions to the welfare of the family have economic significance, they may justify an alteration of property interests on the same basis as contributions to property. As has already been observed, marriage involves a sharing not just of property but of economic existence. If a marriage breaks down prematurely, there may need to be an adjustment of property interests to reflect the contributions that each spouse has made to their economic life together as well as to their property. The example already given of a husband who uses his salary to pay off the mortgage on the matrimonial home and a wife who uses her income to pay for the food and household supplies, indicates the need for an alteration of property interests based on economic contributions to the welfare of the family. The wife's financial contributions not only free the husband of the need to purchase food and household supplies for the family so that he can take, or more

18 [1983] FLC 91-364.
19 *Id.*, 78,446.
20 *In the Marriage of Ashton* [1986] FLC 91-777, 75,659.

comfortably take, responsibility for the mortgage repayments, they also provide the family with the food and other day-to-day domestic requirements that are necessary for the family to live as a social unit.

There is a common opinion, however, that patently non-economic contributions to the welfare of the family can provide a proper basis for an alteration of property interests. The justification for this view is difficult to appreciate. It probably lies not in what the contributor, most often the wife, has done to promote the welfare of the family in the past, but in the effect that these contributions have had, especially as a result of foregoing employment opportunities, upon this spouse's present and future economic position. To this extent paragraph (c) should be aligned not with the contribution considerations of paragraphs (a) and (b), but with the general maintenance considerations of paragraphs (d), (e) and (f).

V. JUSTIFICATION OF THE MAINTENANCE CONSIDERATION OF SECTION 79(4)

It is now well established that the three considerations in section 79(4)(d), (e) and (f) together require the Family Court to take into account the general future maintenance needs of the parties to proceedings for an alteration of property interests.[21] This broad object is particularly evident from the terms of paragraph (e), which require the Court to take into account the fourteen maintenance considerations set out in section 75(2) so far as they are relevant. Of course the provisions of paragraphs (d), (e) and (f) require the Court to have regard to rather more than just the general maintenance needs of the parties, but this is the broad object of these three paragraphs.

To the extent that an alteration of property interests can make provision for the future maintenance of a spouse, the justification for achieving this particular end in this way is the same as that for securing spousal maintenance generally. It is irrelevant that the criteria for considering maintenance in the context of an alteration of property interests are different from those relevant to a maintenance order,[22] for the broad object of both — securing the future economic welfare of a spouse — is the same.

The justification for spousal maintenance is similar to the justification for an alteration of property interests based on past contributions to property in that it concerns the fact that marriage is usually intended by the parties to last for their joint lives. It differs, however, in that it concerns a different aspect of this important feature of marriage. This is that in many marriages one spouse, almost invariably the wife, will forego employment opportunities, either totally or partially, in order to promote the welfare of the family by engaging in domestic activities.

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21 See note 6 *supra*.

22 See *In the Marriage of Dench* (1978) 33 FLR 156, 161, 164.

Clearly no reasonably intelligent spouse would forego employment opportunities, with the economic consequences that this involves, without the expectation of receiving something in return. In the majority of cases the *quid pro quo* is the expectation by this spouse that his or (more usually) her economic needs will be met by the other spouse. More particularly, where one spouse foregoes employment or other economic opportunities in order to further the welfare of the family, and the other does not, the parties usually organize their joint lives on the basis that the economic needs of the former spouse will be met by the latter. In most cases indeed the understanding is that the economic needs of the dependent spouse will be met by the other spouse indefinitely. It is only because one spouse expects to be maintained, or at least partially maintained by the other, that he or she is prepared to forego personal economic gain in order to promote the domestic welfare of the family as a whole.

The fact is however, that despite the expectation of the parties to a marriage that their relationship will last for their joint lives, many marriages come to a premature end. The provision of maintenance is thus justified as a form of compensation to a spouse for the loss of the continuing support that he or she had expected to receive into the future, and in return for which this spouse forewent financial gain during the period of cohabitation.[23]

Two observations may be made about the justification for the provision of maintenance that has been presented. The first is that it does not depend upon any causal relationship between the domestic activities of the one spouse and the economic activities of the other. Some commentators and judges, particularly those who have been attracted to the ideas of Sir Jocelyn Simon, seek to justify economic provision for a wife on the ground of just such a causal relationship. In his celebrated lecture to the Holdsworth Club, Sir Jocelyn Simon said:

> [b]ut men can only earn their incomes and accumulate capital by virtue of the division of labour between themselves and their wives. The wife spends her youth and early middle age in bearing and rearing children and in tending the home; the husband is thus freed for his economic activities. Unless the wife plays her part the husband cannot play his. The cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it.[24]

On this theory the economic activities of a husband are dependent upon the domestic activities of his wife. The truth is, however, that with modern child-minding facilities and labour-saving devices, it is often not necessary for wives to stay at home in order for their husbands to work for financial gain. Maintenance is nonetheless justified by virtue of the fact that in arranging their lives in such a way that one spouse engages, or more extensively

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23 See P. Symes, 'Indissolubility and the Clean Break' (1985) 48 *Mod L Rev* 44, 57-58.

24 Note 10 *supra*, 14-15. Referred to with approval by the Full Court of the Family Court in *In the Marriage of Wardman and Hudson (formerly Wardman)* (1978) 33 FLR 196,204. See also, J. Simon, 'The Seven Pillars of Divorce Reform' (1965) 62 *Law Soc Gaz* 344, 345.

engages, in domestic activities and the other in economic activities, there results an economic dependency by the former spouse on the latter. The premature end of the marriage thus calls for the provision of compensation to the dependent spouse for the loss of the expectation of continuing support.

The second observation that may be made about the justification for the provision of maintenance is that it is based not on any notion of compensation for past domestic services, but on the need for compensation to a spouse for the loss of the continuing economic support which he or she was led to expect and on account of which this spouse then organized his or her joint life with the other spouse. In short, the need for spousal maintenance is based on the fact of spousal dependency and not on any claim for services rendered.

VI. TWO PROBLEMS ARISING FROM THE JUSTIFICATIONS FOR ALTERATION OF PROPERTY INTERESTS

The justifications which have just been given for alteration of property interests raise two problems. The first relates solely to the maintenance function of alteration of property interests. It concerns the apparently reasonable conclusion that if it is proper for a spouse to be compensated upon the premature termination of marriage for the loss of the continuing economic support that he or she had expected to receive, it is proper for this spouse to receive full compensation, or at least compensation that is clearly related to the loss suffered. In this case it would seem preferable for a dependant spouse to receive only periodical maintenance, and not lump sum maintenance or an alteration of property interests, for only in this way can such a spouse be assured of receiving compensation that fairly reflects his or her loss through the breakdown of the marriage.

There are however many arguments against requiring one spouse to maintain his or her partner over a long period of time after the breakdown of marriage. One is that this does not encourage a dependent spouse to seek employment and thus break from a position of dependency. Another is that a requirement to provide continuing maintenance prevents the maintaining spouse from commencing a new domestic relationship free of any connection with that which has failed. But the fact remains, if it is proper that a spouse be compensated upon the premature termination of marriage for the loss of the expectation of continuing economic support upon which he or she organized his or her married life, anything less than full compensation may be unjust to that spouse.

One of the well known problems with using an alteration of property interests to provide for the future maintenance needs of a spouse is that this often fails to make adequate provision for the dependent spouse.[25] This is

25 See P. Mcdonald, *Settling Up: Property and Income Distribution on Divorce in Australia* (1986).

especially the case when the value of the property available for distribution is relatively modest. It is also the case when the future maintenance needs of a spouse cannot be calculated with any precision. In the former case it may nonetheless be considered more appropriate to provide for a spouse's maintenance needs out of the available property and thus sever the economic nexus between the parties, than to continue the financial ties between the parties indefinitely by making an order for periodic maintenance. In the latter case a rough estimate, or even a guess, may be all that is possible. The point to be made, however, is that unless a spouse receives full compensation for his or her economic loss through the premature termination of marriage, an injustice may well be done to that spouse which reference to countervailing considerations will do nothing to mitigate.

The second problem that arises from the justifications that have been presented concerns the vexed question of whether matrimonial fault and misconduct should play any part in the distribution of property after marriage breakdown. The Family Court has made it clear that generally speaking matrimonial fault and misconduct have no place in an alteration of property interest under section 79 except to the extent that such behaviour has economic significance and can be brought within the scope of one or other of the six considerations of section 79(4) in one of the established ways.[26] This reflects the general view that matrimonial fault and misconduct are ordinarily irrelevant under the Family Law Act. As Aickin J. said concerning the place of matrimonial guilt and innocence under the Act in *Dowal* v. *Murray*,[27] "[s]uch conceptions are dead and buried by the *Family Law Act* and should not be exhumed."[28]

Much of the opposition to allowing matrimonial fault or misconduct to play any part in contemporary family law is based on ideological or (to be blunt) emotive grounds. There has certainly been scant consideration given to any theory concerning the place of fault or misconduct in family law. If however a justification for alteration of property interests rests upon the fact that a marriage has come to a premature end, and that this has unjust economic effects upon one of the spouses, it may be that the cause of the marriage coming to an end is relevant to the relief that should be granted to the economically disadvantaged spouse.

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26 *In the Marriage of Ferguson* (1978) 34 FLR 342; *In the Marriage of L.* [1978] FLC 90-493, 77,556. See also *In the Marriage of Wells* (1977) 29 FLR 383, 387-388; *In the Marriage of Morgante* [1977] FLC 90-297, 76,571, 76,572-76,573; *In the Marriage of Garside* (1978) 34 FLR 367, 371.

27 (1978) 143 CLR 410.

28 *Id.*, 437.

For example, if the justification for an alteration of property interests rests upon the fact that a spouse has been economically prejudiced by reason of the termination of the marriage which that spouse had originally expected to last for life, should this spouse be able to claim an alteration of property interests, whether on the ground of past contributions or future maintenance needs, if he or she was the cause of the breakdown of the marriage? Can it not be argued that if a spouse is responsible for the breakdown of marriage, he or she has no right to any form of economic compensation from the other spouse, for the disadvantaged spouse is then the author of his or her own misfortune?

On the other hand, can it not equally be argued that if the spouse responsible for the breakdown of marriage is the person whose reciprocal role it is to support the other spouse, he or she should ordinarily compensate the latter spouse fully? Unless there is a duty of full compensation, this economically superior spouse will gain financially from his or her action to the detriment of the other spouse.

There are, of course, obvious problems with the arguments that have just been put forward. Not the least of these is the problem of causation. When can it be said that one spouse is solely, or even primarily, responsible for the breakdown of marriage? This is a question that has been ignored over recent years, principally as a reaction to the regime which operated in the pre-Family Law Act days, when the respondent to dissolution proceedings was deemed to be the 'guilty' party despite the fact that in many cases of marriage breakdown each of the parties undoubtedly bore some responsibility for the failure of the relationship. An aversion both to the crudity of the theory of causation that applied under the old law and to the exaggerated place of matrimonial fault and misconduct that resulted from it, should not however lead to an avoidance of any consideration of these matters in the context of modern family law. No study of the moral justification of any form of family or matrimonial relief can ignore these matters. It may find that ultimately they have no relevance, but it cannot ignore them.