Is there a need for more certainty in discretionary decision-making in Australian family property law?

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As family law in Australia is under consideration by the Australian Law Reform Commission, it is an opportune time to consider whether the family property regime is in need of reform, in particular to provide more certainty. This article explores, and details, the courts' power to circumscribe the exercise of discretion in this area by making legitimate guidelines and binding rules. The article argues that insufficient attention has historically been paid to this power, resulting in a lack of clarity as to the status of statements of legal principle. The article concludes that this, alone, does not justify wholesale property law reform. It supports targeted, limited, legislative reform and greater focus by the judiciary on the classification of statements of principle.

Introduction

Australian family law is a jurisdiction characterised by discretionary decision-making. The legislative provisions in the *Family Law Act 1975* (Cth) ('*FLA*') governing the two key areas of parenting and property disputes include mandatory considerations; however, in the end it is a matter for the judicial officer what parenting orders they consider to be in a child's best interests, or what order altering property interests, if any, is appropriate. In the over 40 years since the *FLA*'s introduction, judges have sought to provide some guidance as to how discretion should be exercised in particular circumstances, to ensure consistency in decision-making. There has been considerable confusion, however, as to the status of such judicial statements and the extent to which they are binding. This has created uncertainty, particularly in the area of property law where, perhaps unsurprisingly, judicial statements of principle are more common. As the Australian Law Reform Commission ('ALRC') has just embarked on a review of family law, including property matters,[1] the time is ripe to consider whether there is a lack of certainty in relation to property matters and if so, how that should best be addressed.

This article explores what the courts have said to date about the extent to which discretionary decision-making in family law can be circumscribed by the creation of binding rules and 'legitimate guideline[s]'.[2] It argues that a

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1 See Australian Law Reform Commission ('ALRC'), *Review of the family law system* (31 May 2018) <www.alrc.gov.au/inquiries/family-law-system>; the relevant term of reference is considering 'the underlying substantive rules and general legal principles in relation to ... property'.

2 A term coined in *Norbis v Norbis* (1986) 161 CLR 513, 520 (Mason and Deane JJ) ('*Norbis*').

taxonomy of sorts has been developed, which does, in theory, permit the classification of judicial statements such that their status can be determined. However, in practice superior courts have, until very recently, failed to be clear in applying this taxonomy, leaving uncertainty as to the precedential status of judicial statements of principle. While touching on parenting disputes, the article concentrates on property and assesses the legal 'principles' relating to property disputes identified in the Full Court decision of *Hoffman v Hoffman*,[3] by way of an example of the lack of clarity in the application of the taxonomy of rules. It also considers whether there are any 'binding rules' operating. The article concludes there is a case to be made for very limited, and targeted, legislative intervention, but that any such project should be approached with great caution and should be buttressed by keen judicial attention to the precedential significance of statements of principle.[4]

The discretionary nature of decision-making in family law

The two central areas of decision-making in family law are parenting and property disputes. Since its inception, the *FLA* has been structured such that decision-makers are vested with considerable discretion as to the orders they make in both of these areas. While pt VII, which deals with parenting disputes, has undergone far more amendment than pt VIII dealing with property, in neither area has the underlying broad discretionary nature of the task given to the court changed.

Parenting disputes

In parenting disputes, the *FLA* requires the court to make the order that is in the best interests of the child concerned.[5] Since 2006 there has been a presumption in favour of the making of an order for equal shared parental responsibility ('ESPR').[6] This presumption only applies to parental responsibility for 'major long-term issues'[7] (what would once have been known as 'guardianship'); thus an order for ESPR does not apply to the day-to-day care of the child, including where the child lives. The presumption of ESPR does not apply where there are reasonable grounds to believe a parent has engaged in abuse of a child, or family violence[8] and will be rebutted if ESPR is not in the child's best interests.[9] As a presumption, the effect is that the person seeking some alternative order bears the burden of proof. The other sections relevant to the exercise of discretion in making parenting orders do nothing more than identify numerous considerations which must be taken into account if they arise on the facts, including a catch-all of 'any other fact or

3 (2014) 51 Fam LR 568 ('*Hoffman*').
4 For a somewhat different perspective on uncertainty in Australian family property law, and solutions thereto, see Patrick Parkinson, 'Why are decisions on family property so inconsistent?' (2016) 90 *Australian Law Journal* 498.
5 *Family Law Act 1975* (Cth) ('*FLA*') s 60CA.
6 Ibid s 61DA.
7 Ibid s 4.
8 Ibid s 61DA(2).
9 Ibid s 61DA(1).

circumstance' that the court considers relevant.[10] The court has been abundantly clear that nothing in those sections gives rise to any presumptions as to what order is best for any particular child.[11] Every child is different and the court must decide, having taken into account all relevant evidence, what orders are in the particular child's best interests. Indeed, the court can even make an order not sought by either parent.[12]

In 2006, the list of considerations relevant to the court's exercise of discretion was divided into 'primary' and 'additional' considerations.[13] The two primary considerations are the benefit to the child of having a meaningful relationship with both parents[14] and the need to protect the child from harm.[15] The legislation is unclear as to the impact of these being 'primary' (as opposed to 'additional') considerations and it has been held that 'additional considerations' can take priority in appropriate cases.[16] In 2012, the *FLA* was amended to the effect that when the primary considerations are in conflict (most often when it is alleged a parent may cause harm to a child), protection from harm must be given more weight.[17] Some judges have indicated that this amendment has not changed the law, as this would always be the case.[18] Other judges have held that this new provision does not mean protection from harm 'trumps' all other considerations.[19] Young, Dhillon and Groves have argued this provision requires that the court exercise its discretion so as to first and foremost, protect the child from harm.[20] If that is the case, then it is arguable that this is the *only* section which provides inescapable direction as to how the court *must* exercise its discretion in parenting matters; namely, it is arguable the section is saying that it will *always* be in a child's best interests for the order to protect the child from harm above and beyond everything else and therefore an order that achieves that must be preferred to one which compromises protection from harm.[21] Even if that is the case, and as yet there is no jurisprudence to support this (one would have thought obvious) interpretation, the decision-maker is still left with the discretion to determine how the child can best be protected from potential future harm. Whatever the

10 Ibid s 60CC(3)(m).
11 *Gronow v Gronow* (1979) 144 CLR 513.
12 *U v U* (2002) 211 CLR 238; *Goode v Goode* (2006) 36 Fam LR 422, 435–6 [42]–[48].
13 *FLA* ss 60CC(2)(a)–(b) (primary), 60CC(3)(a)–(m) (additional).
14 Ibid s 60CC(2)(a).
15 Ibid s 60CC(2)(b).
16 Eg, a court may decide to place more weight in making its decision on the impact on the child of separating them from a long-time social parent (such as a grandparent) than on the benefit to the child of developing a meaningful relationship with a previously absent biological parent: *Mulvany v Lane* (2009) 41 Fam LR 418.
17 *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) s 60CC(2A).
18 *Tyler v Sullivan* [2014] FamCA 178 (26 March 2014) [36]; *Sawyer v Clancy [No 2]* [2012] FMCAfam 1369 (14 December 2012); *Elrasheed v McGrieve* [2014] FamCA 11 (17 January 2014) [123] (Forrest J).
19 *Labine v Labine* [2012] FMCAfam 1398 (21 December 2012) [108]–[110] (Brown FM); see Justice Steven Strickland and Kristen Murray, 'A judicial perspective on the Australian family violence reforms 12 months on' (2014) 28 *Australian Journal of Family Law* 47, 70.
20 Lisa Young, Sandeep Dhillon and Laura Groves, 'Child sexual abuse allegations and s 60CC(2A): A new era?' (2014) 28 *Australian Journal of Family Law* 233, 258–62.
21 Young, Dhillon and Groves, above n 20, 260.

correct interpretation of this new provision, it can be seen that the discretion afforded decision-makers determining parenting disputes remains extremely broad.

As noted above, pt VII has undergone significant reform, and there is no doubt the suite of changes was aimed at influencing how the court exercised its discretion.[22] Legislators were of the view that courts were not placing sufficient weight on shared parenting, and tended to order routine parenting arrangements that did not ensure children were spending appropriate time with both parents.[23] The two rounds of reforms to pt VII in 1996[24] and 2006 have arguably been successful in affecting decision-making in this regard. That is, decision-makers[25] are far more likely to order greater degrees of shared care than they might once have been;[26] but that is not because the *FLA requires* them to exercise discretion in a particular way. Aside from the presumption about long-term issues referred to above — which is still subject to the discretionary consideration of the child's best interests — the other significant change was to word the *FLA* such that the court *must* often[27] 'consider' a 50/50 shared physical care parenting arrangement as part of its deliberation. However, having to consider an arrangement, and having to order it, are two very different things and while the judiciary 'got the message' and are more likely to order shared care,[28] the bottom legislative line remains, namely that the court is directed to make the order — *whatever that may be* — that it considers is in the child's best interests, the one limitation being to prioritise the child's protection from harm.

Property disputes

In the case of property disputes — that is, the discretion given under the *FLA* to decide how spousal[29] property should be divided (if at all)[30] — the provisions introduced in 1976 have not undergone any significant recent

22 Standing Committee on Family and Community Affairs, House of Representatives, *Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation* (2003); Richard Chisholm, 'Making it work: The Family Law Amendment (Shared Parental Responsibility) Act 2006' (2007) 21 *Australian Journal of Family Law* 143, 144–7 examines 'the perceived problems and the purposes of the legislation'.

23 Standing Committee on Family and Community Affairs, above n 22; Lisa Young et al, *Family Law in Australia* (LexisNexis Butterworths, 8th ed, 2013) 396.

24 The *Family Law Reform Act 1995* (Cth) pt VII s 60B (a statement of objects of pt VII).

25 Both parenting and property disputes can be heard in a range of specialised family courts, as well as magistrates' courts in more remote areas.

26 Belinda Fehlberg et al, 'Legislating for Shared Time Parenting after Separation: A Research Review' (2011) 25 *International Journal of Law, Policy and the Family* 320; Rae Kaspiew et al, 'The Australian Institute of Family Studies' Evaluation of the 2006 family law reforms: Key findings' (2010) 24 *Australian Journal of Family Law* 5, 20; Rae Kaspiew et al, 'Evaluation of the 2006 family law reforms' (Report, Australian Institute of Family Studies, 2009).

27 If an order for equal shared parental responsibility ('ESPR') is made (and this will be common), the court must consider equal shared physical parenting: *FLA* s 61DA; *Goode v Goode* (2006) 36 Fam LR 422; *McCall v Clark* (2009) 41 Fam LR 483.

28 Belinda Fehlberg et al, 'Legislating for Shared Time Parenting after Separation: A Research Review' (2011) 25 *International Journal of Law, Policy and the Family* 320.

29 De facto spouses are covered by the *FLA* provisions: *FLA* ss 90SB(a), 90SM.

30 *Stanford v Stanford* (2012) 247 CLR 108 ('*Stanford*') has confirmed the terms of the legislation are clear that a division is not to be assumed always to be fair.

amendment in terms of their general application.[31] Perhaps the most important amendment was the insertion in 1987 of s 79(4)(c) which is aimed at ensuring decision-makers give proper consideration to contributions to the 'welfare' of the family, particularly where those contributions are not directly tied to the accumulation of assets.[32] Section 79(1) permits the court to make 'such order as it considers appropriate' while s 79(2) prohibits the court from making an order unless satisfied that in all the circumstances it is 'just and equitable' to do so. There has been some recent and important judicial guidance as to how the 'just and equitable' requirement affects the process of decision-making, however, it does not change the fact of the wide discretion afforded to the court in deciding what order, if any, to make.[33] Section 79(4) requires the court, in exercising its discretion, to take account of financial, and non-financial, direct and indirect contributions to assets, as well as contributions to the welfare of the family. There is nothing in s 79 that provides any further direction as to how the court's discretion should be exercised.

Guiding the exercise of discretion

The High Court

In 1986 Mason and Deane JJ in *Norbis v Norbis*[34] confirmed the discretionary nature of the power under s 79. Having referred to the classic statement in *House v The King*[35] as to when an exercise of judicial discretion may be interfered with on appeal, their Honours said:

> Here the order is discretionary because it depends on the application of a very general standard — what is 'just and equitable' — which calls for an overall assessment in the light of the factors mentioned in s 79(4), each of which in turn calls for an assessment of circumstances. Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends.[36]

This general statement about the nature of discretionary judicial decision-making applies equally to the provisions relating to the making of a parenting order.

The High Court recognised in *Norbis* that while the new *FLA* provisions were clear on the breadth of discretion, justice would be enhanced where there was some consistency in decision-making, and so the Court considered the extent to which the discretion under s 79 could be fettered by the creation of judicial principles or guidelines. However, their Honours were not unanimous

31 There have, of course, been important amendments over that period, eg, in relation to matters such as superannuation, bankruptcy and interests under trusts.
32 *Family Law Amendment Act 1987* (Cth) s 79(4)(c).
33 *Stanford* (2012) 247 CLR 108, 121–2 [39]–[42].
34 (1986) 161 CLR 513.
35 [1936] 55 CLR 499, 504–5.
36 *Norbis* (1986) 161 CLR 513, 518 (Mason and Deane JJ); see also 536 (Brennan J).

in their views. Given the limited, and confusing, subsequent consideration of these issues, and the ongoing reliance on *Norbis*, it is important to set out the views expressed in that case, which remains an important authority.

For Mason and Deane JJ, the fact that judicial discretion is framed in general terms does not mean parliament intended the court to 'refrain from developing rules or guidelines' that affect the exercise of that discretion. In their Honours' view, appellate courts are entitled to give guidance falling short of a binding rule and even at times give 'guidance the force of a binding rule by treating a failure to observe it as constituting grounds for a finding that the discretion has miscarried'.[37] Their Honours went on to note that broad discretion 'maximizes the possibility of doing justice in every case' however:

> the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision-making, provides an important countervailing consideration supporting the giving of guidance by appellate courts, whether in the form of principles or guidelines ...[38]

While acknowledging there was tension between these competing considerations, their Honours were of the view that the special position of the Full Family Court was such that it *should* give guidance, but nearly always 'in the form of guidelines rather than binding principles of law', there being very limited scope for the creation of binding rules of law.[39] They were clear that failing to apply a 'legitimate guideline' was not of itself an error, however, it would call into question the ultimate exercise of discretion and 'ease the appellant's burden of showing that it is wrong'.[40]

Wilson and Dawson JJ saw the matter differently, referring to Gibbs CJ's statement in *Mallett v Mallett*[41] that prior decisions can 'do no more than provide a guide' and cannot fetter a legislative power that is expressed in unfettered terms. The view of Gibbs CJ was not expressly confirmed by any other members of the Court in *Norbis*, and Deane J had in fact made a statement in *Mallet*[42] that might be seen as a precursor to his more detailed views in *Norbis* referred to above. Wilson and Dawson JJ went on to say the following:

> it is not possible to take the question of guidelines further than [Gibbs CJ in *Mallet*]. Nor is it desirable to attempt to do so. With all respect to those who think differently, we believe that the sound development of the law, in this area as in others, is served best by following the tradition of the common law. The genius of the common law is to be found in its case-by-case approach. The decision and reasoning of one case contributes its wisdom to the accumulated wisdom of past cases. The authoritative guidance available to aid in the resolution of the next case lies in that accumulated wisdom. It does not lie in the abstract formulation of principles or guidelines designed to constrain judicial discretion within a predetermined framework. There is

37 Ibid 519 (Mason and Deane JJ).
38 Ibid.
39 Ibid.
40 Ibid 520 (Mason and Deane JJ).
41 Ibid 533 (Wilson and Dawson JJ) citing *Mallet v Mallet* (1984) 156 CLR 605, 608–9 (Gibbs CJ) ('*Mallet*').
42 *Mallet* (1984) 156 CLR 605, 610 (Deane J).

> no reason to think that the traditional approach, when applied in the family law area, leads to arbitrary and capricious decision-making or that it leads to longer and more complex trials.[43]

The central problem with this statement is that it ignores the complexity of the operation of the doctrine of precedent. The common law is not homogenous and its application will depend on the nature of the power being exercised. The common law does not, for example, always provide decision-making on a case-by-case basis; in the context of non-discretionary decision-making the whole point of precedent is that, where the facts are materially the same, so should be the outcome. Conversely, a discretionary decision-making power will — absent judicial intervention — preclude the use of factual precedents in that way. A vague statement about 'the genius of the common law' does not answer the question of how the law ensures the 'accumulated wisdom of past cases' might properly inform discretionary decision-making. Moreover, Wilson and Dawson JJ's comments about how this impacts on family law decision-making were made in the early days of the *FLA*; many would hold a different view today, as is evidenced by discussions about this kind of discretion in other common law jurisdictions, and indeed moves towards less discretion in various jurisdictions.[44]

Finally, Brennan J accepted there could be legitimate guidelines, save that he did not agree the court could elevate a principle to a binding rule of law that would absolutely fetter the exercise of discretion.[45] Indeed, his Honour saw *Mallet* as evidence of this. *Mallet* considered whether there existed, or could exist, a Full Court principle to the effect that in the case of longer marriages with 'normal contributions' the starting point of assessment was that equality would reflect equity. In other words, could the Full Court apply a presumption of equality in long marriages that had to be rebutted? Brennan J had this to say, which is significant when considering the operation of precedent in family law:

> The authority of an appellate court to give guidance is not to be doubted. It is inevitable that the wisdom gained in continually supervising the exercise of a statutory discretion will find expression in judicial guidelines. That is not to invest an appellate court with legislative power but rather to acknowledge that, in the way of the common law, *a principle which can be seen to be common to a particular class of case will ultimately find judicial expression*. The orderly administration of justice requires that decisions should be consistent one with another and decision-making should not be open to the reproach that it is adventitious. These considerations are of especial importance in the administration of the law relating to custody of children, maintenance and property arrangements on the dissolution of marriage. The anguish and emotion generated by litigation of this kind are exacerbated by orders which are made without the sanction of known principles and which are seen to be framed according to the idiosyncratic notions of an individual judge. An unfettered discretion is a versatile means of doing justice in particular cases, but unevenness in its exercise diminishes confidence in the legal process.[46]

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43 *Norbis* (1986) 161 CLR 513, 533–4 (Wilson and Dawson JJ).

44 See, eg, the law now in Scotland: Jane Mair, 'The *Family Law (Scotland) Act 1985*: A principled system in context' (2018) 32 *Australian Journal of Family Law* 204.

45 *Norbis* (1986) 161 CLR 513, 536 (Brennan J).

46 Ibid 536 (Brennan J) (emphasis added).

Discretionary decision-making powers are of course seen in other areas of law. In the 2001 High Court case of *Wong v The Queen*[47] the question was whether criminal courts have the power to issue prescriptive guideline tables of sentences. *Norbis* was argued in support of the proposition that such a power did exist. Gaudron, Gummow and Hayne JJ said that:

> Importantly, the three Justices who constituted the majority in *Norbis* did not agree on what consequence would follow if a trial judge did not observe a guideline of the kind that had been adopted. Two members of the majority, Mason and Deane JJ, were of the opinion that an appellate court which gives guidance as to the manner in which a statutory discretion should be exercised may prescribe that such guidance should have the force of a binding legal rule. The third member of the majority, Brennan J, disagreed.
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> This difference of opinion in *Norbis* identifies the central difficulty about a guideline judgment which purports to identify a particular range of results that should be reached in future cases, rather than the considerations which a judge should take into account in arriving at those results.[48]

To be precise, Mason, Deane and Brennan JJ did not, in fact, disagree on the impact of a guideline; rather Brennan J simply took a different view on the elevation of a guideline to a binding rule. Further, this difference of opinion is not related to the question of pre-determining ranges of outcomes (as might happen in sentencing). Indeed, with one exception discussed below, none of the case law in family law (including *Norbis*) purports to set ranges for outcomes;[49] rather they deal with the treatment of specific aspects required to be considered in the overall exercise of discretion. Further, the discussion in *Norbis* did not concern the question of *which* considerations *should* be taken into account in the exercise of discretion. Indeed, there has been little or no discussion about the legal status of such statements in the Family Court, as self-evidently such decisions fall within the very broad scope of the legislation. The question of whether a matter is a relevant, or irrelevant, consideration (as often arises, for example, in administrative law concerning the exercise of a discretion) is in essence one of statutory interpretation. It is not an exercise of discretion by the court. *Norbis* was considering guidelines that guide the exercise of discretion — that is, the way discretion should generally be exercised in relation to a particular relevant factor.

Perhaps because of the nature of the matter before them, the High Court in *Wong* do not tease out the distinction drawn by Mason, Dean and Brennan JJ between a binding legal rule and a legitimate guideline, and the question of the impact of a legitimate guideline on the exercise of discretion. In fact, the plurality in *Wong* characterise the 'guideline' for sentencing as in effect a binding legal rule, as it 'was intended to have prescriptive effect ... [and] was to be treated as if departure from it would evidence an error of principle'.[50] Their Honours conclude that the 'publication of expected or intended results of future cases is not within the jurisdiction or the powers of the court'. In a

47 (2001) 207 CLR 584 ('*Wong*').
48 Ibid 613 [79]–[80] (Gaudron, Gummow and Hayne JJ).
49 There is more to be said on the question of the 'range of outcomes': see *Wallis v Manning* [2017] FamCAFC 14 (10 February 2017) [47]ff and note the text at 23–6 below.
50 *Wong v The Queen* (2001) 207 CLR 584, 615 [83] (Gaudron, Gummow and Hayne JJ).

separate judgment, Kirby J reaches the same conclusion with very similar reasoning. *Wong*, therefore, arguably confirms the position of Brennan J (and Wilson and Dawson JJ) in relation to binding legal rules.

It is harder to discern what, if anything, *Wong* decided about the role of legitimate guidelines.[51] It seems the High Court accepted the formulation of judicial guidelines that provide a check, or 'sounding board', for the exercise of discretion. The plurality say that actual sentences imposed in prior cases give 'rise to no binding precedent. What may give rise to precedent is a statement of principles which affect [sic] how the sentencing discretion should be exercised, either generally or in particular kinds of case[s].'[52] In *Norbis* and *Mallet* (and later cases) the questions have been about how the court should weigh particular factual matters raised within the overall exercise of discretion — short marriages, inheritances, lottery wins etc. Perhaps this statement in *Wong*, and the discussion which follows it, confirm that statements of principles, or guidelines, go not to the ultimate exercise of discretion but to the treatment of matters relevant to the overall process of exercising discretion. In *Lovine v Connor* it was referred to as the exercise of discretion within the exercise of discretion.[53] Guidelines of this sort must have some precedential value. After all, if a guideline is nothing more than an example of what other judges have decided, but does not have any force at all, then it is not, in fact, a guideline or statement of legal principle at all. A guideline must do more otherwise a judge need not refer to it; it should be distinguishable from commentary on how other cases have been decided. This conclusion is reflected in *Comcare v PVYW*[54] where the High Court, after referring to Mason and Deane JJ's discussion of guidelines in *Norbis*, said:

> Whatever its form, however, a rule or principle formulated by an appellate court through the accumulation of judicial experience is inherently provisional. The rule or principle is always able to be revised, in light of further accumulation of judicial experience, in accordance with rules of precedent applicable within the judicial hierarchy.

A guideline would not require revision unless it had some force of application. Further, more recent statements of the High Court in *R v Pham*[55] (another appeal concerning sentencing) suggest that lower courts must have regard to appellate judicial guidelines, 'unless there is a compelling reason not to do so'.[56] This accords with the way Mason and Deane JJ saw legitimate guidelines as operating. So, it would seem on balance that appellate courts can develop judicial guidelines ('legitimate guidelines') that should influence the exercise of discretion, though where appropriate, and justified, there is a discretion not to apply them, and they do not determine the overall outcome of the exercise of discretion. What the court cannot do, is make a binding rule that absolutely determines the exercise of discretion.

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51 The affirmation by the majority in ibid 616 [85] (Gaudron, Gummow and Hayne JJ) of a statement of Winneke P in *R v Ngui* [2000] 1 VR 579, 584 [12] might be argued to provide some support for the majority position in *Norbis* (1986) 161 CLR 513.

52 *Wong* (2001) 207 CLR 584, 605 [57] (Gaudron, Gummow and Hayne JJ).

53 (2012) FLC ¶93-515 [103] ('*Lovine*').

54 (2013) 250 CLR 246, 296 [140] (Gageler J).

55 (2015) 256 CLR 550.

56 Ibid 560 [29].

The Full Family Court

The implications of *Norbis* for the exercise of discretion have attracted surprisingly little attention from the Full Family Court over the years.[57] More than a decade after *Norbis*, in the 1999 case of *Re Browne v Green,*[58] the Full Court considered whether the trial judge's failure to apply the *Re Kowaliw*[59] principle — that deals with the question of when pre-separation debts can be attributed solely to one party — amounted to the failure to apply a legitimate guideline. The Court held that, despite the Full Court not having previously analysed the concept in detail, the principle in *Kowaliw* had over time become a 'well accepted guideline ... the use of which assists in the achievement of the important goal of consistency within the jurisdiction'.[60] It was further held that, in departing from the *Kowaliw* principle, the trial judge had erred, not because it was a binding rule of law, but because it was a guideline and there was no good reason for not applying it.

More than another decade later, in 2010 in *Amero v Croft*[61] the Full Court discussed whether there was a prescribed '4 step approach' to deciding s 79 property cases arising from the decision in *Re Hickey*.[62] The Full Court in *Re Hickey* did not refer to *Norbis* nor to the creation of legitimate guidelines. The issue in the case was the interpretation of s 79 and what it required by way of a process of decision-making. The 4-step approach was suggested as one way of ensuring that all required matters were considered under s 79. However, in *Amero* when reiterating that *Re Hickey* did not prescribe a required approach to s 79, the Full Court included in their reasons reference to Mason and Deane JJ's discussion in *Norbis* of legitimate guidelines, albeit without any careful analysis of its relevance.

The Full Court has most recently considered the issue of binding rules and legitimate guidelines in a significant property case, *Hoffman v Hoffman*.[63] For a number of decades the Full Court had been grappling with a concept known first as 'special skills' and later 'special contributions'. This 'principle' was applied exclusively (though it was said to be of broader application)[64] to justify extra weighting being given to the contributions of breadwinner spouses where the efforts of their labour happened to be especially fruitful — for that reason, they were known as 'big money' cases. Despite some trenchant critique, both academic and judicial,[65] the principle survived such

57 An online search of the phrase 'legitimate guideline' in the Australian Legal Information Institute <http://www7.austlii.edu.au/> in the Full Family Court (at the time of writing) identified only two cases: *Hoffman* (2014) 51 Fam LR 568 and *Amero v Croft* [2010] FamCAFC 118 (25 June 2010) ('*Amero*'), discussed below.

58 (1999) 25 Fam LR 482.

59 (1981) FLC 91-092 ('*Kowaliw*').

60 *Re Browne v Green* (1999) 25 Fam LR 482, 496 [44].

61 [2010] FamCAFC 118 (25 June 2010).

62 (2003) 30 Fam LR 355.

63 (2014) 51 Fam LR 568.

64 Lisa Young, 'Sissinghurst, Sackville and "Special Skill"' (1997) 11 *Australian Journal of Family Law* 268.

65 *Re Figgins* (2002) 29 Fam LR 544, 557 (Nicholson CJ and Buckley J); ibid; Lisa Young, 'Rich Women and Divorce: Looking for a "Common Sense" Approach' (2004) 22(1) *Australian Canadian Studies* 95.

that it was being routinely referred to[66] until the decision in *Hoffman*. However, a number of recent first instance decisions had called into question the adoption of any special rule for rich breadwinner spouses,[67] and naturally appeals resulted.[68] In *Hoffman*, the Full Court revisited the question of the extent to which 'guidelines' can impact on the exercise of judicial discretion under the *FLA*. After referring to *Norbis* and *Mallet*, their Honours said:

> What emerges, relevant to the instant discussion is, first, that there is a distinction between a 'legitimate guideline' and guidance or 'statements of principle' that do not fit that description. Secondly, a 'legitimate guideline' requires, axiomatically, a principle which can be identified with clarity and, in addition, the identification of a 'particular class of case' to which it applies. As has been seen, a legitimate guideline should either apply to *all* cases or, at least, *all* instances within an identifiable category of case.[69]

In relation to binding rules, their Honours note the difference of judicial opinion in *Norbis*, stating that even if the view of Mason and Deane JJ were preferred, in the case at hand there was no binding rule of law. Both the Full Court in *Hoffman* and *Re Browne v Green* take the position that, even if binding rules of law are permissible (which arguably they are not), they would be rare.[70]

This review shows that the case law to date does not permit the Full Court to make binding rules. Appellate judges may lay down 'legitimate guidelines' which guide some aspect of the exercise of discretion, however, there is discretion in applying such a guideline. As the Full Court said in *Lovine v Connor*, 'the exercise is one of discretion within a discretion';[71] and that discretion to apply a guideline may miscarry if the failure to do so causes the overall exercise of discretion to miscarry. Thus, the failure to apply a legitimate guideline suggests the need for close scrutiny of the ultimate exercise of discretion. Where a legitimate guideline is not applied, an appellant must show that this departure was not justified by the facts and circumstances of the case, and also show this resulted in the overall discretion miscarrying.

Against this backdrop, one would imagine that the Full Court has, over the decades, identified with some clarity those statements of principle that are legitimate guidelines, however that has not been the case. The question of 'special contributions' is a case in point — after many decisions, including at Full Court level,[72] discussing and applying this principle, the Full Court in *Hoffman* agreed with the trial judge in that case that there was no principle or guideline in relation to 'special contributions' for rich breadwinners. This

66 As evidenced by the central issue at stake in the appeal in *Hoffman* (2014) 51 Fam LR 568.

67 In *Hoffman* (2014) 51 Fam LR 568, 582 [61] it was noted that O'Ryan J had referred to the 'notion of special contribution [having] been a terrible mistake' in *D v D* [2005] FamCA 1462 [271].

68 *Fields v Smith* (2015) 53 Fam LR 1; *Kane v Kane* (2013) 50 Fam LR 489; *Gorman v Gorman* [2014] FCCA 1358 (10 July 2014).

69 *Hoffman* (2014) 51 Fam LR 568, 576 [41].

70 (1999) 25 Fam LR 482, 497 [49]; ibid 575 [28], 581 [59].

71 (2012) FLC ¶93-515 [103].

72 *Re Ferraro* [1992] FamCA 64 (9 November 1992); *Re Whitely* (1992) FLC 92-304; *JEL v DDF* (2000) 28 Fam LR 1; *Re Figgins* (2002) 29 Fam LR 544; *Re McLay* (1996) 20 Fam LR 239; *Re Stay* (1997) 21 Fam LR 626.

conclusion in fact belies the way prior courts had approached big money cases and 'special contributions', thus evidencing the confusion about the status of the principle.[73]

As to other examples of legitimate guidelines, the Full Court in *Hoffman* said:

> Contentions have been made periodically that 'legitimate guidelines' exist in respect of a number of purported 'categories of case'. Examples might be seen to include global/asset-by-asset approach; initial contributions; gifts and inheritances; waste; and conduct making contributions significantly more arduous.
>
> Consideration of the decisions to which reference has just been made reveals that *some* statements within those cases *may* be described as 'legitimate guidelines' in the sense just discussed while many others may not.
>
> The essential inquiry, however, is not one of categorisation or labelling; rather the task is to assess, relevantly, whether the authorities reveal a principle enunciated with clarity and clear indicia as to a class or category of case in which the clear principle can be applied universally so as to guide the exercise of the discretion in the sense earlier outlined.[74]

It was not for the court in *Hoffman* to consider which of the examples mentioned in the first paragraph involved legitimate guidelines and which did not, however, the way this statement is phrased again confirms the confusion existing in relation to a number of principles. This raises the question of the extent to which the Full Court is explicit in identifying legitimate guidelines. Before turning to that question, however, let us consider whether there is, in fact, a binding rule of law being applied by the Full Family Court.

Rice v Asplund — A binding rule?

If anything could be argued to be a rule which binds the exercise of discretion in family law, it is the principle from *Rice v Asplund*[75] — namely, that you cannot re-litigate a parenting order (whether made by consent or otherwise) without showing a material change in circumstances.

Evatt CJ, with whom Pawley SJ and Fogarty J agreed, said this in the 1979 case of *Rice v Asplund*:

> The principles which, in my view, should apply in such cases are that the court should have regard to any earlier order and to the reasons for and the material on which that order was based. It should not lightly entertain an application to reverse an earlier custody order. To do so would be to invite endless litigation for ... change is an ever present factor in human affairs. Therefore, the court would need to be satisfied by the applicant that, to quote *Barber J*, there is some changed circumstance which will justify such a serious step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material ...[76]

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73 *Hoffman* (2014) 51 Fam LR 568, 575 [28]–[29].
74 Ibid 577 [42]–[44] (footnotes omitted; emphasis added).
75 (1979) FLC 90-725, 78,904.
76 Ibid 78,905–6.

Since this time, and despite all amendments to pt VII, this principle has been consistently applied at first instance and by the Full Court. The Full Court in *SPS v PLS* had this to say about the reason for the rule:

> Another end served by the rule is that it avoids one judge substituting his or her opinion of what is in the best interests of a child for that of another judge, though both opinions are based on the same or similar facts. This 'evil' is avoided *by a requirement* that the previous order should not be altered unless there has been a change of circumstances sufficient to justify that result ...[77]

However, their Honours went on to say, somewhat confusingly, that: '[a]t whatever stage of a hearing the rule is applied, its application should remain merely a manifestation of the "best interests principle"'.[78]

Notwithstanding this last statement, there appears to be no discretion about whether or not to apply the rule in *Rice v Asplund*, though there is discretion as to when in the hearing the matter is considered.[79] The nature of this 'rule' was directly considered by the Full Court in the 2014 case of *Poisat v Poisat*,[80] as one ground of appeal was that there was no rule or principle deriving from *Rice v Asplund*. The Full Court began by noting that counsel had not addressed how the taxonomy developed in *Norbis* applied to *Rice v Asplund*, saying that prior court decisions had also failed to address this issue.[81] The Full Court expressed the view that the principle had 'all the hallmarks of a "binding rule" in the sense in which Mason and Deane JJ use that expression'.[82] After providing some support for that interpretation,[83] their Honours concluded thus:

> Whether or not the principle might be properly called a 'binding rule' in the sense used by Mason and Deane JJ, for present purposes it can be said that the 'rule in *Rice and Asplund'* is of long-standing, has been consistently recognised and applied both in this Court and at first instance, and is intended to apply universally in the sense of applying to every case in which final parenting orders are sought to be discharged or varied subsequently.
>
> Having regard to all of those matters, a departure from the principle (or 'binding rule' or 'guideline') emanating from *Rice and Asplund*, as the second ground of appeal suggests, requires cogent arguments as to why earlier decisions of this Court are wrong and should not be followed. No such arguments have been made in the present case.
>
> Further, we see no reason to ourselves find that there is no such rule or principle as 'the rule in *Rice and Asplund*'.[84]

If a rule applies universally to every case — that is, its application is not able to be avoided by argument as to the particular facts — and the rule determines

77 (2008) 39 Fam LR 295, 307 [58] (emphasis added).
78 Ibid 309 [74].
79 *Marsden v Winch* (2009) 42 Fam LR 1, 17 [43].
80 [2014] FamCAFC 128 (21 July 2014).
81 Ibid [9]–[11].
82 Ibid [11].
83 Their Honours refer to the way the principle is treated in an unreported High Court special leave application and references to the principle in notes to Acts amending the *FLA* and explanatory memoranda relating thereto.
84 *Poisat v Poisat* [2014] FamCAFC 128 (21 July 2014) [13]–[15].

the exercise of discretion, then it would seem this is, indeed, a binding rule. We are not aware of a case where *Rice v Asplund* has not been applied in the absence of a change in circumstances. Thus, whether or not it is perceived to be a 'manifestation' of the best interests test, it might be said that if it looks like a binding rule, and acts like a binding rule, then it is, indeed, a binding rule. And yet, the High Court has said that binding rules governing the exercise of discretion are not permissible.

Legitimate guidelines in the exercise of the Family Court's property discretion

The foregoing discussion points to the fact that the family court judiciary do not make a habit of making explicit whether their statements are binding legal rules (which must be followed), legitimate guidelines (which should generally be followed, unless the peculiar facts of the case demand otherwise) or statements merely indicating the way discretion is often exercised but with no precedential force. The latter category should be obvious by the court treating the matter as one which turns on the facts of the particular case and which can only be challenged by showing that, in general, the exercise of discretion is not within the reasonable bounds of discretion. That is, where an appellate court treats a matter as turning on its own facts, rather than considering whether the facts fit within a clearly identified class of case, then one should be able to safely assume that no legitimate guideline applies. Conversely, where an appeal is upheld based on the failure to apply a principle — notwithstanding the particular facts — then that principle should be a binding rule of law, as in *Rice v Asplund* (though this would seem to be the only binding rule, if indeed it is). The intermediate position is where a court may overturn a decision on the basis that a legitimate guideline was not applied when nothing on the facts of the case warranted a departure from the guideline.

On the nature of guidelines, Brennan J had this to say in *Norbis*:

> The expression of guidelines must be undertaken cautiously, ensuring that a sense of urgency does not diminish the care necessarily to be taken in expressing guidelines in terms which will be seen to be just and equitable in the generality of cases. It is not enough to assert the predilections of particular judges as guidelines ...
>
> The nature of the discretion is such that, if guidelines can be expressed, they will be expressed in very general terms. Detailed guidelines are unsuitable for application to circumstances which are quite diverse ... Guidelines necessarily express standards and values: not legal standards and values, but standards and values derived from sources which the court thinks appropriate ...[85]

The Full Court in *Hoffman* pointed out something that has become apparent to anyone working, writing or teaching in family law — there may be a range of 'principles' routinely referred to by judges when discussing the exercise of the property discretion, however, it is not at all clear what their status is within the taxonomy discussed in *Norbis*. While it is notable that all of the principles referred to in *Hoffman* relate to property (*Hoffman* was itself a property case)

85 *Norbis v Norbis* (1986) 161 CLR 513, 538–9 (Brennan J).

it would be surprising if it were otherwise. It is one thing to guide the exercise of discretion in relation to, say, the treatment of financial contributions brought into a relationship, it is another thing to develop guidelines that must be applied in exercising a discretion to decide how a child should be parented. Thus, in the case of parenting disputes the court has a long history of being emphatic that statements as to what may generally be in the best interests of children have no presumptive role. Accordingly, there is no legitimate guideline about keeping siblings together, or placing children in the predominant care of their long standing primary carer,[86] for example.

The list of potential legitimate guidelines referred to in *Hoffman* was: the global v asset-by-asset approach; initial contributions; gifts and inheritances; waste; and conduct making contributions significantly more arduous. *Re Browne v Green*[87] established that the *Kowaliw* principle mentioned above is a legitimate guideline.[88] This is presumably what the Full Court was referring to when it mentioned 'waste'. What of the other examples of potential legitimate guidelines? These are considered briefly in turn below, together with the questions of 'notional addbacks' and 'long marriages', as recent cases have also called into question whether any legitimate guidelines exist in these contexts. While it will be seen that in some instances the answer as to whether there is a legitimate guideline operating can be determined, superior recent appeals precisely on that question are an indicator of the uncertainty surrounding the application of 'principles' of longstanding. Indeed, what we see in the case law is a very recent appreciation by the Full Court of its failure over the years to address this issue.

Initial contributions

How should a court weight a contribution to the parties' asset pool where that contribution was brought into the relationship; for example, a home owned by one party when cohabitation began? And is the weight of that initial contribution affected by the length of the relationship (that is, will the weight of that initial contribution diminish the longer the relationship lasts)?

In 2009, the Full Court in *Cabbell v Cabbell*[89] (Boland, Thackray and O'Ryan JJ) noted that case law in this area prior to 1999 had seen judicial officers discussing the offsetting or eroding of initial contributions by later contributions made during the relationship.[90] Their Honours went on to point out that this approach was not supported by the Full Court in *Re Pierce*[91] (Ellis, Baker, O'Ryan JJ) where it was said:

> In our opinion it is not so much a matter of erosion of contribution but a question of what weight is to be attached, in all the circumstances, to the initial contribution.

86 *Gronow v Gronow* (1980) 144 CLR 513.
87 (1999) 25 Fam LR 482, 497.
88 It is possible that in a 'waste' case, the court considers notionally adding back an asset. Where that is the case, then note the comments below about the impact of the High Court decision in *Stanford* (2012) 247 CLR 108. However, a waste case does not require an add back, and so the guideline should presumably still apply notwithstanding *Stanford*.
89 [2009] FamCAFC 205 (20 November 2009) ('*Cabbell*').
90 Ibid [43].
91 (1998) 24 Fam LR 377.

> It is necessary to weigh the initial contributions by a party with all other relevant contributions of both the husband and the wife.[92]

The Court in *Cabbell* was considering a claimed failure by the trial judge to trace, and therefore give appropriate weight to, the initial contributions of the husband in terms of their role in generating the assets held at trial. After reviewing further cases, their Honours referred to this statement from *Williams v Williams* (Kay, Coleman and Stevenson JJ):

> We think that there is force in the proposition that a reference to the value of an item as at the date of the commencement of cohabitation without reference to its value to the parties at the time it was realised or its value to the parties at the time of trial, if still intact, may not give adequate recognition to the importance of its contribution to the pool of assets ultimately available for distribution towards the parties ... But in so doing it is equally as important to give recognition to the myriad of other contributions that each of the parties has made during the course of their relationship.[93]

Their Honours concluded thus:

> We do not think it is necessary we attempt to prescribe further guidelines for the discretionary exercise which must be undertaken by a trial Judge in assessing initial contribution. That exercise must be undertaken having regard to the individual facts of a particular case.[94]

Despite their Honours' unnecessarily confusing reference to 'further guidelines', it would seem there are no 'legitimate guidelines' in the case of initial contributions. This discussion says nothing more than that judicial officers must weigh the respective contributions of the parties and that cannot be done without considering the impact an initial contribution has on the creation of the parties' wealth. These cases say nothing about any principle as to *how* discretion should be exercised in relation to initial contributions. That is because s 79 demands the consideration (that is, identification and weighting) of *all* contributions and these cases simply reiterate that necessity. At the end of the day, the weight a judicial officer attributes to an initial contribution remains a matter of discretion.

However despite this, evidence of judicial confusion about the existence of 'principles' in this area can be seen as recently as 2014 when another differently constituted Full Court (May, Ainslie-Wallace and Tree JJ) said that '[it] is well established established by the authorities that, over time, the significance of any disparity of initial contributions progressively diminishes',[95] citing *Re Pierce* amongst other cases in support. This case is clearly out of step with authority outlined above.

Global v asset-by-asset approach to assessing contributions

The Family Court has adopted two distinct methods of assessing contributions. One approach is to look asset by asset, and assess each parties'

92 Ibid 385 [28]. See also *Dickons v Dickons* (2012) 50 Fam LR 244, 250 [23]–[26].
93 *Cabbell* [2009] FamCAFC 205 (20 November 2009) [44] referring to *Williams v Williams* [2007] FamCA 313 (11 April 2007) [26].
94 [2009] FamCAFC 205 (20 November 2009) [45].
95 *Meredith v Allen* [2014] FamCAFC 223 (21 November 2014) [98].

contributions thereto. More commonly, however, the Court considers the contributions in what it refers to as a 'global' way (considering the contributions in relation to the 'totality of the assets')[96] as this is seen to be a more appropriate way of considering the often very different contributions of a couple. In particular a failure to do this may result in an undervaluing of contributions to the welfare of the family which are not directly traceable to an asset.[97] At times, a combination of approaches has been adopted.[98] Various cases have referred to the types of factual scenarios that will lend themselves to an asset-by-asset assessment,[99] that being the less common approach. The question of whether there was any rule or principle as to when to apply the different approaches was considered by the High Court in *Norbis*. Brennan J was clear that there is no binding rule or legitimate guideline as to when to adopt the different approaches:

> The present case, however, does not involve the Family Court's authority to prescribe either a legal rule controlling or a guideline affecting the exercise of a discretion. The global approach which the Full Court of the Family Court regarded as appropriate in the present case is not a guideline affecting the order which should be made. The global approach is no more than a procedure for determining the exercise of the discretion. It is a procedure which tends to shorten the hearing so as to avoid sapping the finances of the parties and engendering further ill-feeling between them. The primary judge's adoption of the asset by asset approach in lieu of the global approach was not an error affecting the validity of the order which he made. There is no logical foundation for concluding that one approach should produce, at the end of the day, an order different from, or preferable to, the order which the other approach would produce. Either approach is capable of producing a just and equitable order. To intervene merely on the ground that the primary judge did not adopt the global approach would be to require primary judges to follow a single procedure when more than one procedure is consistent with the provisions of the Act.[100]

Wilson and Dawson JJ also appeared to adopt this view.[101] Conversely, but in the minority on this point, Mason and Deane JJ had the following to say:

> Which of the two approaches is the more convenient will depend on the circumstances of the particular case. However, there is much to be said for the view that in most cases the global approach is the more convenient. It follows that the Full Court is quite entitled to prescribe that approach as a guideline in order to promote uniformity of approach within the Court ...
>
> Accordingly, quite apart from the fact that its status as a prescribed approach is that of a guideline and not that of a principle of law, the application of the asset-by-asset approach does not of itself amount to an error of law.[102]

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96 'To have regard to the totality of the assets was described by the Full Court in *Antmann* [at 75,742], as taking "a global view" in accordance with its own direction in *Tuck* and the remarks of Nygh J in *Aroney*': *Norbis* (1986) 161 CLR 513, 530 (Wilson and Dawson JJ).

97 *Re McLay* (1996) 20 Fam LR 239.

98 *Re G* (1984) FLC 91-582, 79,697; *Norbis* (1986) 161 CLR 513, 533.

99 *Re Lenehan* (1987) 11 Fam LR 615; *Re McMahon* (1995) 19 Fam LR 99; *Re Zyk* (1995) 19 Fam LR 797, 802–3.

100 *Norbis* (1986) 161 CLR 513, 541 (Brennan J).

101 Ibid 533 (Wilson and Dawson JJ).

102 Ibid 523–4 (Mason and Deane JJ).

The Full Court revisited this issue in 2013 in *Greer v Mackintosh*[103] and, finding no error in the trial judge using the global approach, adopted the words of Brennan J in the extract from *Norbis* set out above.[104] The Full Court accepted the submissions of counsel for the wife that the *FLA* did not demand any particular process for evaluating contributions, that a judge does not need to explain why a particular method is used, and that using the different approaches should not yield different results.[105] Thus, the majority position in *Norbis* applies and there is no legitimate guideline in relation to the question of whether the asset-by-asset or global approach to the assessment of contributions is utilised.

Inheritances

Many cases have had to deal with the question of how the court should treat an inheritance received by one of the parties to a relationship. Relevant facts may include: the identity of the testator, what contributions were made, and by whom, to the receipt of the inheritance (such as working on a farm), when the inheritance was received and what was done with it. Again, this is an area where recent appeals indicate a lack of clarity as to the status of the case law in this area. For example, in the 2013 case of *Bishop v Bishop*[106] the Federal Magistrate who heard the matter at first instance said: 'I think I am constrained by authority to leave the inheritance received late in the marriage by the wife out of the calculation of the pool.'[107]

The authority the Federal Magistrate was referring to is the oft-cited 'inheritance case' of *Bonnici v Bonnici*.[108] In *Bonnici* the Full Court said:

> The more difficult issue in this case is as to whether the same should be treated differently from other types of property in which the parties clearly have an interest.
>
> The answer, we consider, must depend upon the circumstances of individual cases. If, for example, in the present case, there had been no other assets than the husband's inheritance, but the wife had, as his Honour found, clearly carried the main financial burden in the support of a family and also performed a more substantial role as a homemaker and parent than the husband, then it would clearly be open and indeed incumbent upon a Court to make a property settlement in her favour from such an inheritance.
>
> A property does not fall into a protected category merely because it is an inheritance. *On the other hand, if there are ample funds from which an appropriate property settlement can be made and a just result arrived at, then the fact of a recently acquired inheritance would normally be treated as an entitlement of the party in question.*
>
> The other party cannot be regarded as contributing significantly to an inheritance received very late in the relationship and certainly not after it has terminated, except

103 [2013] FamCAFC 16 (20 February 2013).
104 Ibid [36].
105 Ibid [31]–[33].
106 [2013] FamCAFC 138 (6 September 2013) ('*Bishop*').
107 Ibid [25].
108 (1992) FLC 92-272, 79,019–20 ('*Bonnici*').

> in very unusual circumstances. Such circumstances might include the care of the testator prior to death by the husband or wife as the case may be or other particular services to protect a property.[109]

The Full Court in *Bishop* clarified that, despite the statement as to the 'normal' treatment of late acquired inheritances in a case of ample funds:

> his Honour was not constrained by what the Full Court said in *Bonnici* about the treatment of inheritances. As the Full Court emphasised in that decision, and as we cannot emphasise too strongly, each case in this jurisdiction will depend on its own facts or circumstances.[110]

This was confirmed very recently (after *Hoffman*), in *Calvin v McTier*.[111] So, the statement in *Bonnici* amounts to no more than the court reflecting on the fact that very often discretion may be exercised in this way; there is no imperative to justify, however, a different approach by a judge (as would be the case, were it a legitimate guideline).

Windfalls — The lotto cases

Another potential 'category of case', is one involving a windfall in the nature of a lottery win. How does the court assess contributions to such an asset? The Full Court in *Re Zyk* had this to say on the matter:

> In the ordinary run of marriages a ticket is purchased by one or other of the parties from money which he or she happens to have at that particular time. That fact should not determine the issue. Where both parties are in receipt of income and where their marriage is predicated upon the basis of each contributing their income towards the joint partnership constituted by their marriage, the purchase of the ticket would be regarded as a purchase from joint funds in the same way as any other purchase within that context and would be treated accordingly ... Where one party is working and the other is not the same conclusion would ordinarily apply because that is the mode of partnership selected by the parties ... There may be cases where the parties have so conducted their affairs and/or so expressed their intentions that this would not be the appropriate conclusion ...[112]

In the more recent case of *Eufrosin v Eufrosin*[113] the Full Court considered a case where the ticket was purchased by the wife post-separation but with funds from a business that the husband had run during the relationship and from which both parties were making withdrawls to fund their post-separation lives. The husband argued the purchase of the ticket was from joint funds, however, the Full Court held this was not the relevant point:

> As this Court in *Zyk* made clear, the source of funds should not 'determine the issue' of how a lottery win should be treated for s 79 purposes. What is relevant, in our view, is the nature of the parties' relationship at the time the lottery ticket was purchased. In our view, the authorities just cited, together with what was said by the High Court in *Stanford* regarding the 'common use' of property, is sufficient to dispose of the husband's contention that her Honour erred in failing to find that he

109 *Bishop* [2013] FamCAFC 138 (6 September 2013) [26] (emphasis added).
110 Ibid [28].
111 (2017) 57 Fam LR 1, 12 [50].
112 (1995) 19 Fam LR 797, 808.
113 [2014] FamCAFC 191 (2 October 2014) [11] (emphasis in original).

> contributed to the wife's lottery win. At the time the wife purchased the ticket, regardless of the source of the funds, the 'joint endeavour' that had been the parties' marriage had dissolved; there was no longer a 'common use' of property. Rather, the parties were applying funds for their respective *individual* purposes.

One can see from the above extract that these statements are not about the exercise of discretion. Rather, this is an issue of fact being discussed — that is, did the husband contribute to the acquisition of the ticket and thus the windfall? These cases go to the question of what amounts to a contribution, but say nothing about the exercise of discretion as to how those contributions should be weighted.[114]

Conduct making contributions significantly more arduous — *Re Kennon*[115] contributions

The Family Court has long held the position that parties cannot be credited with 'negative' contributions.[116] Wasting of assets may be relevant to the exercise of discretion in certain circumstances, as outlined in *Kowaliw*, however this is conceptualised as being different from a general concept of negative contributions.[117] Also, since the introduction of the *FLA*, parties may not rely on arguments of fault in property matters.[118] Nonetheless, the Family Court has in recent years determined that violent conduct can be relevant to the exercise of discretion under s 79. Thus, cases often now talk about '*Kennon'* adjustments, adopting the name of the Full Court case in which the principle was first espoused.[119] In 2012 the Full Court in *Baranski v Baranksi*[120] said this about the *Kennon* principle:

> In reality, the obiter dicta of the majority in *Kennon* did no more than confirm that, where the contributions of a party are rendered more arduous by the violent conduct of that party's spouse ... that is a matter which is relevant to determining the nature and quality of the parties' contributions.[121]

Their Honours affirmed the Federal Magistrate's understanding of the manner in which a *Kennon* adjustment should be determined:

> To be relevant, it must be demonstrated that the husband's violent conduct had a 'discernible impact' upon the wife's contributions. In essence, the question for the court is whether it was more difficult or onerous for the wife to be a homemaker and parent because of the husband's violent behaviour.[122]

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114 For an unusual example of how a lottery winning during a relationship was treated as one party's contribution see *Elford v Elford* (2016) 55 Fam LR 247.
115 (1997) 22 Fam LR 1 ('*Kennon*').
116 *Re Antmann* (1980) 6 Fam LR 560.
117 *Re Browne v Green* (1999) 25 Fam LR 482, 497; *Re Omacini* (2005) 33 Fam LR 134, 145.
118 *Re Soblusky* (1976) 12 ALR 699.
119 *Re Kennon* (1997) 22 Fam LR 1.
120 (2012) 259 FLR 122.
121 Ibid 178 [259].
122 Ibid 178 [260].

Thus, while *Kennon* 'adjustments' have been endorsed by the court for many years now, they are only recognised in limited situations.[123] On the one hand one might argue *Kennon* does nothing other than reaffirm what the High Court said in the case of *Mallet v Mallet*,[124] namely that 'in determining proceedings with respect to settlement of property, the Court must consider the nature and quality of the contributions made by parties to a marriage'.[125] That is, the Court in *Kennon* recognised that the violence of one party can be relevant to the question of the nature and quality of contributions of the victim party. However, *Kennon* goes further in that it effectively *limits* the relevance of violence to the assessment of contributions; if the criteria laid down in *Kennon* are not met, then violence *may not* be treated by the decision-maker as relevant.[126] While there is no discussion in the case law of whether this is a legitimate guideline, the application of the principle deriving from *Kennon* is widely accepted and where violence is argued to be relevant to contributions the *Kennon* criteria are universally applied. Having said that, as Esteal, Warden and Young show, judicial officers have expressed uncertainty as to when this principle applies, as the criteria are quite vague.[127]

There is not enough space to explore this fully here, however, it is arguable this principle does amount to a legitimate guideline, however it is somewhat different from what might first appear. If the *Kennon* principles apply, the court has a discretion as to how to weigh that factor and whether there should be any adjustment;[128] that accords with the normal application of s 79. *Kennon* tells us that violence *of a certain sort*, can be relevant to contributions. However, and perhaps more importantly, *Kennon* also tells us that a judge is prohibited from finding that violence which falls outside of the *Kennon* criteria is a factor relevant to the contributions of the parties. To give a simple example, *Kennon* requires that there is a course of violent conduct;[129] thus, a single unrepeated act of violence, no matter how serious, and despite its impact, *cannot* be treated as relevant to the parties' contributions and thus cannot be given any weight. Indeed, as in the case of *Rice and Asplund*, it might even be argued that in this respect *Kennon* creates a binding rule, as on the case law to date it would seem to be an appellable error to consider violent conduct in relation to contributions in circumstances falling outside of *Kennon*.

Notional add backs

In the last 2 decades there has been increasing recourse to the practice of notionally 'adding back' into the parties' property pool sums disposed of pre-trial. In some instances this is done due to the premature and inappropriate disposal of assets prior to trial. In *Polonius v York*[130] the Full Court endorsed

123 Patricia Easteal, Catherine Warden and Lisa Young, 'The *Kennon* "factor": Issues of indeterminacy and floodgates' (2014) 28 *Australian Journal of Family Law* 1, 24.
124 (1984) 156 CLR 605.
125 *Baranski v Baranski* (2012) 259 FLR 122, 178 [258].
126 Ibid 178 [260].
127 Easteal, Warden and Young, above n 123.
128 Ibid 11; *Kucera v Kucera* [2009] FMCAfam 1032 (2 October 2009) [110] (Altobelli FM).
129 Easteal, Warden and Young, above n 123, 14; *S v S* (2005) FLC 93-246 [65].
130 [2010] FamCAFC 228 (10 November 2010).

three ways in which financial misconduct or misbehaviour may legitimately be taken into account under s 79: including a notional asset in the pool of assets; taking it into account when assessing contributions; and third, in considering the s 75(2) future needs factors.[131] However, a legitimate expenditure of joint funds[132] — most typically on legal fees[133] — can also be added back. In essence, the court acts on the premise that the asset still exists in the hands of the party who disposed of it; that is, it is credited to their side in deciding the overall split of assets.

In the Full Court case of *Lovine*,[134] one of the grounds of cross-appeal related to the question of notional add-backs and the Full Court had this to say:

> Within the exercise of that overall discretion, when an issue of financial conduct conveniently described generically as a notional add-back arises, it is not determined by the application of fixed legal rules. Guidelines have been formulated over time in a number of well-known authorities concerning issues surrounding notional add-backs ...
>
> Undoubtedly such *guidelines* promote uniformity of approach and diminish the risks of inconsistency and capricious and arbitrary adjudication, but as the High Court made clear in *Norbis & Norbis* ... such guidelines do not constitute binding rules of law. Mason and Deane JJ said in *Norbis* at 75,166:
>
> > The nature of the issues which arise under s 79 is such that there is either little or no scope for giving guidance in the form of binding rules of law.
>
> Understood in this context, disposition of an issue concerning a potential notional add-back does not involve the application of a fixed rule to the facts on which its operation depends. Rather, the exercise is one of discretion within a discretion. That is, a discretion as to the manner in which the issue of notional add-back is to be treated within the overarching discretion of determining just and equitable orders under s 79.[135]

It is difficult to say with certainty what 'guidelines' the court was referring to in *Lovine*. Certainly the cases cited[136] give examples of, and add context to, the situations in which add backs have been made or rejected. However, arguably all one can say with certainty arising out of this case law is that the asset disposed of must have been something that was essentially a joint asset (as opposed to something bought out of post-separation earnings for example).[137]

Since the High Court decision in *Stanford v Stanford*,[138] the appropriateness

131 Ibid [89].
132 Contrast *NHC v RCH* (2004) 32 Fam LR 518, where the ring in question was acquired by the husband from his post-separation earnings, which were not considered joint funds.
133 *NHC v RCH* (2004) 32 Fam LR 518, 533.
134 *Lovine v Connor* (2012) FLC ¶93-515.
135 Ibid [101]–[103] (emphasis added). In this case it was $682 000 paid by the husband to members of the family out of income he derived from his partnership in a professional firm.
136 Ibid [101]; *Re Omacini* (2005) 33 Fam LR 134; *Re DJM v JLM* (1998) 23 Fam LR 396; *Re Townsend* (1994) 18 Fam LR 505; *Kowaliw* (1981) FLC 91-092; *Re Browne v Green* (1999) 25 Fam LR 482; *NHC v RCH* (2004) 32 Fam LR 518; *Cerini v Cerini* [1998] FamCA 143 (8 October 1998); *Polonius v York* [2010] FamCAFC 228 (10 November 2010).
137 *NHC v RCH* (2004) 32 Fam LR 518.
138 (2012) 247 CLR 108.

of the practice of notionally adding back assets has been questioned.[139] It has been suggested at first instance that, if *Stanford* does prohibit this practice, the proper place to consider the issue of disposal of assets is either under s 75(2)(o)[140] or as part of the general assessment of contributions.[141] In this regard, Murphy J said in *Watson v Ling*:

> The assessment of the circumstance under discussion is, ultimately, a matter of discretion ... Equally, however, authority dictates that it will be 'the exception rather than the rule' ... that a direct dollar adjustment equivalent to the amount of the alleged dissipation of the pool is made to the otherwise entitlement of a party. It may be that aspects of the erstwhile treatment of legal fees pre-*Stanford* ... will require further consideration in an appropriate case.
>
> Importantly, of course, as has been emphasised in many authorities including those cited above, not every dissipation by a party can be seen to involve an affront to justice and equity; again the circumstances of the individual relationship must be assessed.[142]

All in all, it seems unlikely that there can be said to be any legitimate guidelines in respect of so-called notional add-backs, notwithstanding the (very confusing) comments in *Lovine*. Rather, as part of its overall exercise of discretion, the court has a discretion to take account, in the way it considers appropriate, of dispositions of assets prior to trial in assessing the ultimate alteration of property interests between the parties and an adjustment based on the precise dollar value of the disposition will be the exception, not the rule. Thus, the question at issue here is more about 'what is in the pool and who has it' than about the weighting of contributions, which involves discretion.

Long marriages

Should the length of a marriage impact on the way contributions are weighted? No doubt more conscious now of the issue of legitimate guidelines, the Full Court in the 2017 case of *Wallis v Manning*, in addressing an appeal ground about the approach to long marriages, referred back to *Norbis*:

> No authorities cited on behalf of the wife at trial or on appeal ... support the contention that a guideline (properly so called) applies to long marriages. Brennan J said in *Norbis*, above, that '[t]he expression of guidelines must be undertaken cautiously' and that '[d]etailed guidelines are unsuitable for application to circumstances which are quite diverse'. The expression 'long marriages' is not itself susceptible to precise definition and the factors embraced by a marriage that meets

139 *Tuck v Dunst* [2015] FamCA 318 (30 April 2015); *Watson v Ling* (2013) 49 Fam LR 303; *Harper v Harper* [2013] FamCA 528 (19 July 2013) [63]–[64] (Macmillan J); *Nash v Nash* [2015] FCCA 1359 (1 June 2015) [73]–[76]. However, see *Chapman v Chapman* [2014] FamCAFC 91 (27 May 2014) [79] where the Full Court does not discuss the impact of *Stanford* (2012) 247 CLR 108 on an appeal ground centering on the question of notional add backs.

140 A section of the *FLA* which permits the court to take into account 'any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account'.

141 *Watson v Ling* (2013) 49 Fam LR 303, 309 [33] ('*Ling*'). See also *Bevan v Bevan* (2013) 49 Fam LR 387, 402 [79], 414 [160].

142 (2013) 49 Fam LR 303, 309 [34]–[35].

> any such description are so diverse that the desired expression of 'the relative [and relevant] importance of those factors' would be elusive if not impossible.[143]

This position is both unsurprising and clear.[144]

Is there a case for legislative reform?

It is very timely, as we indicated at the outset, to consider whether legislative reform is warranted in relation to property matters. Reform might be appropriate where the law is in a state of confusion or operating unfairly, or if perhaps there were evidence of problematic inconsistency in decision-making. The mere fact that there is a difference of opinion as to how individual cases might be resolved, is not sufficient justification for wholesale reform in a discretionary system. As Mason CJ and Deane J in *Norbis* said:

> To avoid the risk of inconsistency and arbitrariness, which is inherent in a system of relief involving a complex of discretionary assessments and judgments, the Full Court, as a specialist appellate court with unique experience in the field of family law in this country, should give guidance as to the manner in which these assessments and judgments are to be made. Yet guidance must be given in a way that preserves, so far as it is possible to do so, the capacity of the Family Court to do justice according to the needs of the individual case, whatever its complications may be.[145]

In relation to the question of uncertainty, the foregoing analysis identifies some judicial confusion about the status of statements of legal principle; however a careful analysis does permit one to identify which statements have precedential force. Moreover, since *Hoffman* there appears to be an emerging awareness by the Full Court of the need to be clearer in this regard. Thus, it is arguable that the law is not generally in a state of confusion, though the Full Court could certainly improve its practice in this regard. Having said that, given there are very few guidelines/rules (waste, violence and the re-litigation of parenting matters at most) there is no reason why some or all of these matters could not be explicitly addressed in the *FLA*. Certainly, re-litigation of parenting disputes is the subject of legislation in many jurisdictions.[146] Waste has been addressed in other jurisdictions.[147] The treatment of violence would also benefit from some more consideration of how best to accommodate it within property disputes[148] (however it must be noted that any current difficulties with the application of *Kennon* only enure to the benefit of perpetrators so from an equity perspective the only case for legislative reform

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143 [2017] FamCAFC 14 (10 February 2017) [44].

144 That case raises other interesting issues about the use of factually similar cases in determining an outcome but that issue is beyond the scope of this article.

145 *Norbis v Norbis* (1986) 161 CLR 513, 519–20.

146 *Care of Children Act 2004* (NZ) s 139A; *Divorce Act*, RSC 1985, c 3 (2nd Supp) (Canada); *Uniform Marriage and Divorce Act* (1970) (US).

147 See *Property (Relationships) Act 1976* (NZ) s 18A; in Canada see British Columbia *Family Law Act*, SBC 2011, c 25, s 95; *Matrimonial Property Act*, RSA 2000, c M-8, s 8(l); *Saskatchewan Family Property Act*, SS 1997, c F-6.3, ss 21(3)(k), 25; *Family Law Act*, RSO 1990, c F.3, s 6(b); *Family Property Act*, CCSM 2010, c F25, ss 6, 14(2)(a)–(b); in the United States, see, eg, Pennsylvania: Pa Cons Stat § 3505 (2012); and North Carolina: NC Gen Stat § 50.20(c)(11a) (Supp 1983).

148 See generally Easteal, Warden and Young, above n 123.

lies in making it easier to factor violence into property settlements). Thus, targeted, and limited, legislative reform could provide clarification.

In terms of consistent outcomes, the Full Court has also developed its thinking on this point in recent times. In 2001 in *G v G*[149] the Full Court considered the extent to which judges should look at 'comparable' cases when exercising their discretion, saying:

> There is, of course, a natural reluctance on the part of this Court to seek to define too closely the parameters of the range of a reasonable assessment of the parties' contributions in any given case, or in a given class of cases, lest it be seen to fall into the error of substituting its own exercise of discretion for that of the trial Judge. At the same time, however, it is the duty and function of this Court to scrutinise the exercise by trial Judge's [sic] of the discretion vested in them by the legislation, and by a process of careful analysis and comparison of like cases, and the promulgation of guidelines for the exercise of the discretion, to attempt to ensure a reasonable measure of consistency of outcomes (and therefore of predictability of result) in similar cases, for the ultimate benefit of the litigating public ...[150]

The issue of the relevance of comparable cases was squarely before the Full Court in *Wallis v Manning*.[151] Having noted that three cases post-*G v G* had cast doubt on the statement above, the Full Court concluded that the comments in those three cases were obiter saying:

> [57] It is axiomatic that, in a guided but otherwise unfettered discretion the result in another case, or indeed in many other cases, cannot *determine* the result in the case under consideration. If it did, the discretion would be improperly fettered.
>
> [58] However, it is one thing to say that an earlier-decided case, or a combination of earlier-decided cases, cannot determine the result of the instant case, but quite another thing to say ... that any comparison with those cases is 'unhelpful'. The latter suggestion is ... inconsistent with both High Court authority and the Full Court authority ...
>
> [59] [*G v G* made clear that] the 'duty and function' of the appellate court is to 'scrutinise' the trial judge's exercise of discretion by a process that comprises 'careful analysis', 'the promulgation of guidelines' *and* 'comparison of like cases'. Doing so fulfils not only the primary function of an appeal court which is to correct error and also to 'ensure a reasonable measure of consistency of *outcomes (and therefore predicability [sic] of result) in similar cases* for the ultimate outcome of the litigating public.' ...
>
> [60] Deane J was ... 'suggesting that realistically there should be a consistency of results' not ... 'simply where some factual circumstances coincide' but, rather, where genuine comparability exists, to provide 'assistance and guidance in determining what is just and appropriate'.
>
> [61] That Deane J is referring not merely to 'consistency in general principles', but also consistency in *assessments* is evident not merely by reference to the words actually used by his Honour ('what is just and appropriate') but also by reference to the counterpoint of that desired consistency: the 'wilderness of single instances' and a 'codeless myriad of precedent'. His Honour opens the paragraph earlier quoted by us by saying: 'It is plainly important that, conformably with the ideal of justice in

149 [2001] FamCA 1453 (1 January 2001).
150 Ibid [236].
151 [2017] FamCAFC 14 (10 February 2017).

> the individual case, there be general consistency from one case to another of underlying notions of what is just and appropriate in particular circumstances'.
>
> [64] In our view, each of the High Court and the Full Court of this court has postulated a role both for guidelines in the "generality of cases or a particular class of cases" *and* a role for comparable cases for determining what is just and appropriate in a particular case ...
>
> [67] While recognising the fact that no two cases are precisely the same, we are of the view that comparable cases can, and perhaps should far more often, be used so as to inform, relevantly, the assessment of contributions within s 79.
>
> [68] The word 'comparable' is used advisedly. The search is not for 'some sort of tariff let alone an appropriate upper and lower end of the range of orders which may be made'. Nor is it a search for the 'right' or 'correct' result: the very wide discretion inherent in s 79 is antithetical to both. The search is for comparability — for 'what has been done in other (more or less) comparable cases' — with consistency as its aim.[152]

So, in terms of certainty and consistency, the Full Court can facilitate this by being explicit about legitimate guidelines, and perhaps having regard to 'comparable cases'. It is probably fair to say that the Full Court has not, to date, paid sufficient attention to the question of how precedent operates in this jurisdiction, and so there has been uncertainty about both guidelines and the use of comparable cases. But it cannot be said that this is now the situation as recent case law has put these issues front and centre.[153] Some limited, targeted legislative reform could aid in this regard.

What then would be the basis for arguing for more wholesale legislative reform? In thinking about this, it is instructive to consider the areas where guidelines have been formulated. What is different about those matters? Brennan J in *Norbis* said: 'Guidelines necessarily express standards and values: not legal standards and values, but standards and values derived from sources which the court thinks appropriate'.[154]

Perhaps we can say that the areas where there is clear guidance all reflect societal standards and are relatively uncontroversial. Who would argue children's interests are advanced by permitting endless litigation? Equally, asking spouses to bear the burden of their wanton or reckless financial behaviour is hard to argue against. So is the general principle that a court can factor in the financial consequences of a course of violent spousal conduct, even if the 'how' of factoring it in may be difficult.

This would suggest that further judicial guidelines have not been developed because in all of the other areas discussed above, the judicial opinion is that there is no consensus on what would be a fair approach across the board. Indeed, to go much further with guidelines, as other jurisdictions have done, would be to head down a very different path for family property matters —

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152 Ibid [57]–[61], [64], [67]–[68] (emphasis in original). However, note the difference of opinion expressed in *Anson v Meek* (2017) 57 Fam LR 23; note also the comment in *Harris v Dewell* [2018] FamCAFC 94 (25 May 2018) [163].

153 See Paul Brereton, 'Breaking precedent: The relevance of previously decided cases in determining the entitlements of parties in property proceedings' (2016) 25 *Australian Family Lawyer* 8 for a recent judicial comment on the issue of comparable cases.

154 *Norbis v Norbis* (1986) 161 CLR 513, 539 (Brennan J).

property law in this way, as is evidenced by the fact that the government has failed to respond to the reform recommendations that have been made to this effect.[155]

The reason there has not been more judicial or legislative intervention can only rest on an argument of fairness. The question is not just one of efficiency. Proponents of major reform might suggest that Australian lawyers have difficulty advising clients, more matters go to trial and bargaining is compromised, though no data to support these claims is provided.[156] The purpose of this legislation is to provide an appropriate, and *fair*, remedy for those who would otherwise be disadvantaged by the operation of the normal rules of property and equity. The question then arises whether those jurisdictions with more rules *in fact* achieve fairer outcomes, or at least do not achieve less fair results — it may (perhaps) be easier to predict an outcome in those jurisdictions, but is the remedial purpose of this legislation being facilitated by that reduction in flexibility? Or conversely, is fairness being compromised to achieve efficiency?

It is beyond the scope of this article to take this argument further; in this article we have argued there is some uncertainty and the court could (over time) rectify this position and there could be de minimis legislative intervention. If legislators were minded to consider wholesale reform, we argue this should not be premised on claims of inconsistency. Any significant reformulation would need to take proper account of the broader question of fairness, particularly in respect of women (and their dependent children), as they are far more likely to suffer economic hardship than men post-separation.[157] These questions are addressed more directly in other articles in this issue.[158]

155 After two Australian Law Reform Commission reports, a joint select committee report, and a failed reform Bill, the federal Attorney-General released a discussion paper in 1999 canvassing two possible reform options; however, nothing came of this. In 2001, the Family Law Council published a letter of advice to the Attorney-General proposing legislative reform to deal with the difficulties arising from the application of the *Kennon* (1997) 22 Fam LR 1 principle; again, this was not acted upon by the government.

156 See, eg, J Thomas Oldham and Patrick Parkinson, 'Evaluating judicial discretion — Family property law in Australia and the USA compared' (2016) 30 *Australian Journal of Family Law* 134, 134–5, 156.

157 For a detailed discussion of this, and in particular the Australian literature, see Belinda Fehlberg, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2014) 10.

158 In the Australian context, see Belinda Fehlberg and Lisa Sarmas, 'Australian family property law: "Just and equitable" outcomes?' (2018) 32 *Australian Journal of Family Law* 81.