



Sissinghurst, Sackville-West and “Special Skill”

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The gardener half artist must depend
On that slight chance, that touch beyond control
Which all his paper planning will transcend;
He knows his means but cannot rule his end
He makes the body: who supplies the soul:
V Sackville-West¹

Introduction

In 1991 Treyvaud J handed down his judgment in *In the Marriage of Ferraro*.² The husband and wife in that case had been married for 27 years when they separated and, despite having no assets to speak of on their marriage, the property to be divided at trial exceeded \$10 million. Throughout this long marriage Mrs Ferraro³ was predominantly engaged in “home duties”, while Mr Ferraro ran what ultimately proved to be a very successful business. In deciding what share of the assets to award to the wife, Treyvaud J uttered the now infamous “Sissinghurst analogy”:⁴

The parties’ property empire blossomed because the husband had the innate drive, skills and abilities to enable him to succeed in his chosen occupation, whereas the wife’s contribution was neither greater nor less than when the husband had been a carpenter. To equalise the parties’ contributions is akin to comparing the contribution of the creator of Sissinghurst Gardens, whose breadth of vision, and imagination, talent, drive and endeavours led to the creation of the most beautiful garden in England, with that of the gardener who assisted with the tilling of the soil and the weeding of the beds.⁵

Mrs Ferraro was accordingly awarded only 30 per cent of the assets. She appealed and, while the Full Court did not entirely approve of the trial judge’s analogy,⁶ at the end of the day Mrs Ferraro still only received 37.5 per cent of the total asset pool (which the Full Court actually valued at closer to \$12 million).

In October of 1990, Rowlands J decided the property division of Brett Whiteley (the acclaimed artist) and his wife, Wendy.⁷ The parties’ 30 year relationship ended with assets exceeding \$11 million, of which the wife

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1 *The Garden*, Michael Joseph Ltd, London, 1946, p 17.

2 Unreported but cited in *In the Marriage of Ferraro* (1992) 16 Fam LR 1 at 3; (1993) FLC 92-335 (Full Court) at 79,545.

3 It is unfortunate that Mrs Ferraro is essentially robbed of any autonomous identity by this title, but the case report does not reveal her Christian name.

4 *In the Marriage of Ferraro* (1992) 16 Fam LR 1 at 35; (1993) FLC 92-335 at 79,569.

5 *Ibid* at Fam LR 28; FLC 79,564.

6 *Ibid* at Fam LR 49; FLC 79,580.

7 *In the Marriage of Whiteley* (1992) FLC 92-304.

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received 32.5 per cent. In addition to her contributions to the welfare of the family, Wendy Whiteley successfully argued that she had made a significant contribution by way of artistic inspiration, art critic and confidante.⁸ And yet she received even less than Mrs Ferraro.

What sets these cases, and these women, apart from others is that their husbands have been particularly successful “breadwinners”. As the Full Court said in *Ferraro*,

[s]o far as the husband is concerned there is no doubt that. . . by his special skills and endeavour he greatly increased the assets of the parties . . . [T]hose special skills are entitled to recognition as an extra or “special” contribution.⁹

The approach adopted in *Ferraro* has recently been affirmed by the Full Court, in the case of *In the Matter of McLay*.¹⁰ Ironically, the applicant in that case, who sought a reconsideration of *Ferraro*, was a husband dissatisfied with a 60/40 split in his favour of the \$8 million pool of assets. In upholding the trial judge’s exercise of her discretion, the Full Court concluded that it was appropriate for it to set out guidelines and principles, as it had done in *Ferraro*. To do so avoided,

the appearance or actuality of a wilderness of single instances and at least the appearance of arbitrary and capricious adjudication, so that the task under s 79 is seen to be a disciplined exercise against the background of principles, concepts and guidance provided by the Full Court.¹¹

That the court’s approach in these “special skill” cases is consistent is acknowledged. The question this paper raises is whether this consistent approach is in fact just and equitable, or are the Full Court’s principles and concepts themselves based on arbitrary and capricious thinking? Section 79 of the Family Law Act 1975 (Cth) requires the court to consider, when dividing property, financial and non-financial contributions to both property and the welfare of the family. It is argued here that the “special skills” exception has little to do with contributions and much to do with chance. Only when the so-called “special skill” results in significant assets of commercial value is the contribution recognised. Thus, significant contributions that either fail to produce equally significant assets or produce assets not susceptible of commercial valuation, are not adequately recognised. In particular, this approach permits the Family Court to undervalue women’s contributions to the welfare of the family.

Despite the Full Court’s purported rejection of the Sissinghurst analogy, the “special skills” exception which they have endorsed, rests on exactly the kind of thinking that led to Treyvaud J’s comment. It will be argued in this paper that two notions are central to this thinking. First, that sole responsibility for the creation of an object can be ascribed to one person. Second, that any activity (and only those activities) which creates enormous wealth must involve “special skill”.¹² As this paper shows, the choice by Treyvaud J of

8 Ibid at 79,298.

9 *In the Marriage of Ferraro* (1992) 16 Fam LR 1 at 50; (1993) FLC 92-335 at 79,581.

10 *In the Matter of McLay* (1996) 20 Fam LR 239; FLC 92-667.

11 Ibid at Fam LR 249; FLC at 82,901.

12 As recent newspaper reports have reminded us, this is not just an Australian phenomenon.

Sissinghurst Gardens as his comparison, is more than ironic. A complex web of interactions led to the creation of that garden, including a good dose of *that slight chance, that touch beyond control*. Were it not for the fortunate financial circumstances of the alleged creator of Sissinghurst Gardens (achieved by birthright and not endeavour), she would not have been able to pursue so vigorously either her passion for gardening or her even greater passion for writing. And neither of these pursuits created great wealth for her during her lifetime. What is more, one might imagine that Vita Sackville-West, the target of Treyvaud J's supposed compliment, would have been affronted, rather than flattered, by both the suggestion that Sissinghurst Gardens was her sole creation and by her use as a justification for demeaning the role of women in marriage.

The Whiteley case

Wendy Whiteley spent 30 years of her life nurturing a relationship that had two significant outputs. One was the Whiteleys' daughter, Arky, the other a large body of paintings. At first glance, no one would question that Arky's "creators" were both Wendy and Brett Whiteley. Each of them provided biologically, socially and financially to her development. Some might say that Wendy's biological contribution was greater than that of her husband. Not only did she provide genetic material, she also provided an incubator which ensured Arky's safe birth. Once born, Arky's major and immediate needs were physical and those needs were met substantially by her mother.¹³ During Arky's childhood the Whiteleys travelled abroad, the finance no doubt provided by the sale of paintings, the care for Arky provided by Wendy. Arky herself travelled to London in 1975,¹⁴ again probably financed by the growing wealth arising from the sale of paintings. Each of the parents contributed to Arky's development in their own way and to the best of their ability.

However, while Arky's parents played a significant role in her development, can we really say that they alone were her "creators"? Arky would have had a wide variety of experiences that shaped the person she is today. Her parents played their part, but so too did circumstance. Perhaps the schools Arky attended, or the relationships she had with her own or the opposite sex, had a profound influence on her development. Who knows? Can we really lay at the feet of the Whiteleys all the successes or failures of their offspring? It is therefore appropriate that Family Court judges do not feel themselves obliged to put a precise value on the contribution each of the parties to a marriage makes to the welfare of the family. They *are* required, however, when dividing

Lady Caroline Conran received one-eighth of the fortune she and husband Sir Terence Conran amassed (*The West Australian*, 5 July 1997, p 19), despite her apparently outstanding contributions to family and business. Even more publicised has been the battle of the Wendts in the United States of America. This case, which should be decided shortly, epitomises the issues involved, with a "corporate wife" (Mr Wendt is an executive with General Electric) claiming half of their estimated \$52 million fortune (see for example *The Australian*, 18 December 1996, p 39 and 12 February 1997 p 25).

¹³ Ibid at 79,298.

¹⁴ Ibid at 79,298.

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the property of the parties, to give proper recognition to the fact that such a contribution is inherently valuable.¹⁵

When judges turn to consider contributions made to property, as opposed to those made to the welfare of the family, it becomes all too easy to make a very grey issue look black and white. For example, who created Brett Whiteley's paintings? Rowlands J, having heard the evidence, made a number of findings about Wendy Whiteley's role in this regard. First, she was, in the early days, a model for some of the paintings.¹⁶ She undertook secretarial and reception work. She was recorded in the tax returns as a part of the business. She cared for Arky when Brett was not available and while they travelled to permit the further development of this business. She kept the house in order, even during Brett's painting "lulls".¹⁷ Wendy was, moreover, an artistic inspiration to Brett and a valuable critic and confidante. Brett said of Wendy's contribution,

[a]ll of my work has been hinged to her, drawn firmly, aesthetically from her. . . If I ever have a retrospective it will be a chronological testament to my relationship with Wendy.¹⁸

The trial judge accepted Wendy's evidence that she and Brett had,

shared an expansion of our intellectual abilities, a knowledge about painting. The entire focus of our lives was geared towards painting as an activity both mine and his. . . It was like a kind of coding, an understanding without having to necessarily go into long intellectual diatribes about the emotion put into painting about what a line meant, about where a space went. We shared a lot. . . We share a lot of research time in galleries, in museums, in travelling always with the major occupation being towards increasing what went into the painting.¹⁹

Rowlands J thus concluded that,

[t]he wife was the husband's close artistic friend and his lover for some thirty years. Art is their life and was their life together. . . Her influence is apparent, visually so, in some of his works. . . The wife was intimately involved with the. . . work. The evidence. . . demonstrate[s] the intense artistic, passionate and emotional life the couple led. These factors together with the husband's statements, drive me to infer that the wife's influence flowed through to. . . the canvas. She assisted in enlarging [the husband's] thought or feeling and so aided and encouraged his artistic scope.²⁰

So, who "created" these paintings? In Rowlands J's view, "[a]ll that having been said his work was, in the ultimate, his work".²¹ This was, however, an unusual case as the judge admitted when he pointed out that "the wife's contribution has been unusually helpful to. . . [the husband] in the process".²² In other words, Brett Whiteley created these paintings with some significant help from his wife. The judge felt his next task to be to try to value the respective contributions to this creation and it is this process which sets

15 Family Law Act 1975 (Cth) s 79(4)(c).

16 *In the Marriage of Whiteley* (1992) FLC 92-304 at 79,298.

17 *Ibid.*

18 *Ibid.*

19 *Ibid* at 79,298-79,299.

20 *Ibid* at 79,299.

21 *Ibid.*

22 *Ibid.*

financial contributions apart from welfare contributions. In carrying out this exercise Rowlands J says,

it is clear that the husband, because of his special skill as an artist, has made by far and away the major contribution to the substantial assets the parties now have. His is an unusual talent which has been instrumental in reaping a rich reward. . . it has been the husband's industry and talent which has been the substantially more significant of the two [contributions]. . . I think it proper to assess contribution 70:30 in favour of the husband.²³

But was it really Brett's "special skill" which entitled him to be accredited with a greater role in the creation of these paintings? Or was it that this particular skill happened to reap such "rich" rewards? What would have happened if Brett had spent his life painting fervently, but with only average commercial success? Would he still have received such a generous settlement? There is no doubt he would not have. As the Full Court pointed out in *Ferraro*,²⁴ special skill is only rewarded in this way when it results in commercially valuable assets. Had the paintings only produced an average income and modest assets, Wendy would have received an equal share of those assets on separation. Moreover, was not Brett's commercial success dependent on a whole host of things outside of his control, not the least of which was the favour of a rather fickle art public? Who knows if Brett Whiteley would have achieved such critical acclaim without the support of Wendy? How can the judge be so sure that it was Brett's "special skill" alone that led to the commercial success?

This might lead one to ask why the court rejected the task of determining who "created" Arky, but was so ready to ascribe the creation of the paintings to Brett? In fact, it is equally difficult to apportion responsibility for the two "creations". The difference is, however, that the paintings have a (high) commercial value and Arky theoretically does not. It is on this basis alone that the two activities are treated differently. Imagine for a moment we could attribute a dollar value to Arky. Would it be more or less than the value of the paintings? What is the most valuable thing the Whiteley's did during their time together: put oil to canvas or give life to another human being?

In a society that generally places great value on human life, it is strange to find the Family Court placing so little value on contributions to family welfare. If Wendy Whiteley made a greater contribution to the "creation" of Arky (and that is not being argued here), why is it that she misses out when it comes to a division of those assets which have a commercial value? After all, what was the "rich" reward for the creation of Arky? If it was her love and affection, are we to expect that she withheld that from the parent that in our terms contributed less to her upbringing? Apparently the emotional rewards of marriage may be shared by both these parents during their lifetime but the financial ones may not. Perhaps a closer analysis of the *Ferraro* case will shed some more light on all these vexing questions.

²³ Ibid.

²⁴ See below at p 6-7.

The Ferraro case

The facts and decision

Mrs Ferraro also spent nearly three decades contributing to a profitable relationship. Like the Whiteleys, the Ferraros were childless and without significant assets when they met and married. For the next 27 years the Ferraros each put considerable effort into raising three children and building up assets worth around \$12 million. Unlike Wendy Whiteley, Mrs Ferraro was not held to have made a significant contribution to the assets built up through the “husband’s” business. Apart from the four years before the birth of the couple’s first child (or should we say “Mrs Ferraro’s” first child?) when the wife assisted with bookkeeping, banking and clerical work of the fledgling business, Mrs Ferraro “made no direct contribution to the husband’s business career”.²⁵ In dividing up the proceeds of this “creation”, Mr Ferraro’s business assets, the Full Court had no trouble finding that,

especially in the last decade of the marriage [when the business was particularly successful], by his special skills and endeavour he greatly increased the assets of the parties. . . [T]hose special skills are entitled to recognition as an extra or “special” contribution.²⁶

Mr Ferraro was a carpenter turned businessman who made a lot of money. Whether through luck or forethought, his business apparently did not crash with the stock market. If Mr Ferraro *had* suffered severe financial losses, however, would he still have argued for the lion’s share of his achievements? There is no doubt that Mr Ferraro worked very hard and had certain skills — but these are no guarantee of financial success. As we shall see, it is the fact that he *was* financially successful that leads the court to say he has a “special skill”, because money is their measure of success.

Now, what was Mrs Ferraro predominantly responsible for creating? Just a couple of kids and an extremely well organised household. As it happens, the court acknowledged her “contributions [in this regard] were outstanding. She virtually conducted the homemaker and parent responsibilities without assistance from the husband”.²⁷ Did the husband benefit equally from her contributions? Not only did he have full benefit during their lives together, he will continue to benefit through his relationship with their children. No penalty there. Mrs Ferraro, however, was denied equal access to the “rich” rewards of “the husband’s” business.

The Full Court actually acknowledged the injustice of this result. Having reviewed the “special skill” cases they came upon the true connecting factor, namely, that all involved skills that led to “very significant assets”.²⁸ They went on to say that,

[t]here does not appear to be any reason in principle or logic why those business skills should be treated differently from the high level of skill by a professional or trade person such as a surgeon, lawyer or electrician. Typically in those cases there

²⁵ *In the Marriage of Ferraro* (1992) 16 Fam LR 1 at 25; (1993) FLC 92-335 at 79,562.

²⁶ *Ibid* at Fam LR 50; FLC 79,581.

²⁷ *Ibid*.

²⁸ *Ibid* at Fam LR 47; FLC 79,579.

is a high level of professional training and the picture of long hours of work over many years. . . The fundamental difference is that those cases normally do not produce the very high value of property with which this and comparable cases are concerned, and a common outcome. . . is. . . equality.²⁹

It is interesting that the judges were quick to lament the unfortunate comparison with circumstances they saw as akin to their own. Other hard working professionals (like themselves) are not afforded the uneven division of assets seen in cases where the application of “special skill” results in assets in the high, rather than the medium, range. Perhaps it was too much to ask that they go one step further and question why the women in these cases, who may well have put in exactly the same effort as their counterparts in “poorer” relationships, should be denied an equal division. As the Full Court noted, in fact these women usually have to put in *more* effort because they have even less help from their “skilled” husbands.³⁰ While the court failed to mention it, we are all aware that some “people” put enormously long hours and considerable skill into tasks that produce no assets (in the eyes of the law): families and children. Given that the court only reflected on one side of this unequal equation, it is not surprising they felt themselves bound by authority to continue the tradition of unequal treatment. Had they looked at the existing authority from a different perspective they may well have reached a different conclusion. Let us then trace, and unpick, the Full Court’s line of reasoning.

The reasoning

The Full Court held that the High Court’s 1984 decision in *In the Marriage of Mallet*,³¹ “still represents the major point of reference for this issue”.³² This case is renowned for rejecting the idea that the starting point for property division should be an assumption of equality of contribution. As Wilson J made clear, equality will only be the measure if, having *compared* the *quality* of the parties’ respective contributions by reference to their own spheres, these contributions are found to be, in fact, equal.³³ The Full Court in *Ferraro* seized on this two step process: judge the quality of the contributions and then compare them. They acknowledged, however, that this seemingly straightforward approach had its problems. In an earlier case,³⁴ Nygh J had already questioned whether Wilson J intended this first step to involve an assessment of,

the quality of each party on a scoring board which, so far as breadwinners are concerned, would give top marks to the Holmes à Court’s of this world and bottom mark to the unemployed roustabout and. . . in the homemaking and parenting stakes would give top marks to those ladies who in the age of the great dictators would have

29 Ibid at Fam LR 47–8; FLC 79,579.

30 Ibid.

31 *In the Marriage of Mallet* (1984) 156 CLR 605; 9 Fam LR 449.

32 *In the Marriage of Ferraro* (1992) 16 Fam LR 1 at 36; (1993) FLC 92–335 at 79,570.

33 *In the Marriage of Mallet* (1984) 156 CLR 605 at 636; 9 Fam LR 449 at 469.

34 See *In the Marriage of Shewring* (1987) 12 Fam LR 139 at 141 where Nygh J’s first instance judgment in this case is cited.

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received the glorious motherhood medal, and bottom marks to those ladies, who it is alleged spend most of their time in the tennis club and coffee klatsch and waste their precious time in idle pleasure.³⁵

The Full Court, however, interpreted Nygh J's statement to mean that "for cases within what might be regarded as the norm or normal range of such roles, no detailed assessment is either called for or appropriate".³⁶ They then went on to explain why they thought the "special skill" cases warranted a different approach. This is a somewhat disingenuous portrayal of Nygh J's sentiments. Nygh J was not only talking about the difficulty of making such a qualitative assessment, he was cautioning against what he saw as an entirely inappropriate role for the court — ranking the people that come before them. His example included, indeed depended upon, those the Full Court would describe as possessing "special skill". Why then did the Full Court feel it was inappropriate to so rank the less wealthy, but acceptable when someone exhibited "special skill"? In essence, what the Full Court has actually done is to confirm the supposedly outlawed presumption of equality in the run of the mill cases: that is, it has rejected the *In the Marriage of Mallet* principle in these cases. Couples who have achieved poorly, modestly or even quite well during their relationship, can be assumed (all else being equal) to have both scored 100 per cent for their contributions. Those, however, who have exercised some "special skill" can score more, usually around 130 per cent it seems. The Full Court is thus still guilty of what Nygh J criticises — it still seeks to rank some people's achievements as more valuable than others'. Moreover, it only endorses the *In the Marriage of Mallet* principle (by which it holds itself bound) in exceptional cases. The only factor that seems to determine which of these two baskets a couple will be put into is the dollar value of their assets.

Leaving aside the somewhat questionable application of the *In the Marriage of Mallet* principle, perhaps we can find some justification for this "special skill" exception if we examine it more closely. In fleshing out what might amount to "special skill", the Full Court talks (first!) of the "homemaker [who] has the responsibility for the home and children entirely or almost entirely without assistance from the other party for long periods or cases such as the care of the handicapped or special needs child".³⁷ The initial thing that strikes one on reading this is that on this definition Mrs Ferraro was mistakenly overlooked as possessing "special skill". The Full Court itself concluded on the facts "[t]hat she virtually conducted the homemaker and parent responsibilities without assistance from the husband".³⁸ Mrs Ferraro was acknowledged to be a homemaker *par excellence*, so why no recognition for her "special skill"? The second remarkable thing about the court's explication is that it does not, in fact, discuss skill. It is not "special skill" that leads people to undertake these tasks. Necessity and social constraints normally force people, usually women, into the roles described. No doubt certain skills are acquired when one becomes effectively a sole parent, or

35 Ibid.

36 *In the Marriage of Ferraro* (1992) 16 Fam LR 1 at 38; (1993) FLC 92-335 at 79,572.

37 Ibid at Fam LR 38; FLC 79,572.

38 Ibid at Fam LR 50; FLC 79,581.

when one has to care for a special needs child, but the court seems to assume that merely *because* one fulfils these roles one has “special skill”. It would be more accurate to say that these people would usually have to put in more effort than many of their counterparts. This may be an extra contribution, but it is not (necessarily) “special skill”.

This brings us to the Full Court’s description of “special skill” as applied to breadwinners. Here they begin by talking of “an outstanding application of time and energy to producing income”.³⁹ Again, this does not connote any “special skill” and indeed, were a breadwinner to apply such energy and time without producing any *extraordinary* income, then the court would not perceive there to be any “special skill”. Which, of course, brings us to the heart of the matter. This exception, as the Full Court points out,⁴⁰ has to date been used to reward very high income earners: it is vast fortunes, the creation of which the court puts down to their “business acumen” or “entrepreneurial skills”, which result in these men being credited with an “extra contribution”.⁴¹ When all is said and done, despite the words “extra contribution” being used occasionally in this context, the truth remains these men have been given an extra slice of the pie simply because the pie happens to be bigger, and they are presumed to be responsible for that.⁴²

As was mentioned above, the Full Court was not oblivious to the injustice of this rule. It was a little surprising then that, having highlighted the inequity of this rule, the Full Court did not make more of the cases it cited that followed *In the Marriage of Mallet*. In particular, they referred to *In the Marriage of Dawes*⁴³ and *In the Marriage of Harris*.⁴⁴ Both cases involved assets around the \$1 million mark, which had largely been accumulated through the husbands’ business interests. Despite this, both wives received a roughly equal share of the total assets. The Full Court in *Ferraro* saw these cases as illustrating “the shift towards a greater societal recognition of the worth of domestic labour and towards giving real substance to the phrase ‘substantial and not token’ rather than paying lip service to it”.⁴⁵ The court had, however, already recognised that in the “normal” case, precedent and practice was to lean towards equality. To assess whether *In the Marriage of Dawes* and *In the Marriage of Harris* did represent any policy shift, one has to ask how far from “the norm” they are. For many, a million dollars is a lot of money. It seems, though, to those in the upper echelons of the legal profession, it is less remarkable. After all, a good house, a share in a successful business, a couple of nice cars and a sizeable superannuation expectation could easily surpass such a figure. Surely this is the reason that, despite the outcomes in *In the Marriage of Dawes* and *In the Marriage of Harris*, the Full Court did not treat Mrs Ferraro and Mrs Whiteley equally well. The only difference between the husbands in these four cases is business assets of about \$10 million. *In the Marriage of Dawes* and *In the Marriage of Harris* resulted

39 Ibid at Fam LR 38; FLC 79,572.

40 Ibid at Fam LR 47–48; FLC 79,579.

41 Ibid.

42 Ibid.

43 *In the Marriage of Dawes* (1989) 13 Fam LR 599; (1990) FLC 92–108.

44 *In the Marriage of Harris* (1991) 15 Fam LR 26; FLC 92–254.

45 *In the Marriage of Ferraro* (1992) 16 Fam LR 1 at 47–48; (1993) FLC 92–335 at 79,579.

in equality not because of a lack of “special skill”, but because of a lack of assets. This might make little sense, but it makes sense of the different treatment of the cases: these two earlier cases fall within the “norm”, *Ferraro* and *Whiteley* do not. It seems even Family Court judges are impressed by assets in excess of \$10 million.

That this is so, is borne out by the very recent decision of *In the Marriage of (D L & G B) Stay*.⁴⁶ In circumstances similar to those of the other cases,⁴⁷ the Full Court held that the assets generated by the “application of the skills of the husband, his ingenuity and enterprise” were “in the medium rather than the high range”.⁴⁸ The court specifically pointed out that *Ferraro*, *In the Marriage of McLay* and *Whiteley* all involved assets in excess of \$8 million, whereas poor old Mr Stay only managed to accumulate \$3.7 million.⁴⁹ Based on this fact alone, the court distinguished those three cases and rejected the notion that Mr Stay possessed “special skill”. As it happens, Mrs Stay (who raised five children) was still only credited with 45 per cent of the contribution towards these assets.⁵⁰

So, it would seem that the evidence of “special skill” when you are a breadwinner, is the perceived product of that skill, that is, assets. For homemakers, however, we saw that judges actually look at effort when assessing contribution (the lone housekeeper or carer of a special needs child). If the court were to treat homemakers like breadwinners, then surely it would be looking for some sort of extraordinary result, such as a gifted child. In this sphere at least it would seem the Family Court implicitly acknowledges that extra contribution or skill is not necessarily any guarantee of such “success”. Perhaps the reality is that very successful couples, in whatever sphere, often *both* have “special skill”. After all, is it not conceivable that Mr Ferraro, Brett Whiteley et al were able to achieve their successes precisely because of their exceptional wives?

Having purported to confirm *In the Marriage of Mallet*, and having effectively distinguished *In the Marriage of Dawes* and *In the Marriage of Harris* on their facts, the Full Court went on in *Ferraro* to apply its two part test: assessing the parties’ respective contributions and comparing them. That process has already been described above and, arguably because Mrs Ferraro’s “special skill” was overlooked, Mr Ferraro was awarded the greater share of the assets. There is one further noteworthy point, however, about this process. Mr Ferraro was attributed with contributions under those parts of s 79 that talk of contributions to property as well as under s 79(4)(c), which refers to contributions to the welfare of the family.⁵¹ His financial support of the family was the basis of the latter. Mrs Ferraro is also permitted under s 79 to claim contributions to property and family welfare. Her contributions to property were indirect in that she freed Mr Ferraro to go off and earn “his” millions.

46 *In the Marriage of (D L & G B) Stay* (1997) 21 Fam LR 626; FLC 92-751.

47 The marriage lasted 27 years, there were no significant assets on marriage, the wife had remained at home and the assets in question were generated through the husband’s building business.

48 *In the Marriage of (D L & G B) Stay* (1997) 21 Fam LR 626 at 633; FLC 92-751 at 84,131.

49 *Ibid*.

50 *Ibid* at Fam LR 640; FLC 84,132.

51 *In the Marriage of Ferraro* (1992) 16 Fam LR 1 at 50; (1993) FLC 92-335 at 79,581.

The court made the “important” qualification, however, in respect of Mrs Ferraro, that “there be no double counting under each of those separate paragraphs”.⁵² When Mr Ferraro does a day’s work, his contribution, his effort, is the day’s work. It is measured, though, by the amount he earns during that day. Let us suppose he earns \$100. Of that, after expenses and tax, a proportion goes towards supporting the family, a proportion no doubt into investments. You cannot divide his day up and say during one part of the day he was working for the family and during the rest for the business. Consequently, he is entitled to recognition for both activities without the need for any precise accounting exercise. The same applies to Mrs Ferraro. During the day, while she was cleaning, cooking, caring for the children and so on, she was making a very significant contribution to the family’s welfare. But, at the same time, every task she undertook permitted her husband the freedom to go out and do paid work. Again, it is not possible to engage in any precise measure of the exact quantum of these two contributions. For both husband and wife, their full-time daily employment has at least two outcomes: earning money and nurturing their family. Why, then, is the court so concerned about double dipping in Mrs Ferraro’s case while seemingly happy to let Mr Ferraro score well on both scales? Again, we find that when “women’s work” is ranked against “men’s work”, the former is undervalued. Despite its supposed commitment to realistically valuing women’s contributions, the Full Court instead shows a reticence to accept the commercial value of work in the home.⁵³

Vita’s Sissinghurst?

As the Full Court pointed out in *Ferraro*, there was a measure of irony in Treyvaud J’s choice of analogy.⁵⁴ After all, who “created” Sissinghurst Gardens? The name most commonly associated with it is Vita Sackville-West. Vita and her husband, Harold Nicholson, bought Sissinghurst Castle in May 1930. Despite the property consisting of a ruined castle and various ramshackled outhouses in “seven acres of muddy wilderness”,⁵⁵ Vita “fell flat in love with it”⁵⁶ the moment she saw it. Harold was equally taken with the ruins of Sissinghurst Castle and they decided to buy it immediately. In fact, the property was purchased in Vita’s name with financial assistance from her mother.⁵⁷ Within days of purchasing the property Vita visited it and planted the first of many plants — a lavender bush.⁵⁸ Vita and Harold were not, however, in a position, financially at least, to do immediately all that they might have liked with the garden. While they had a vision of what might be

52 Ibid at Fam LR 50; FLC 79,581.

53 For further discussion of this topic see H Charlesworth, “Domestic Contributions to Matrimonial Property” (1989) 3 *AJFL* 147.

54 *In the Marriage of Ferraro* (1992) 16 Fam LR 1 at 48; (1993) FLC 92–335 at 79,580.

55 V Glendinning, *Vita: The Life of V Sackville-West*, Penguin Books, London, 1984, p 223.

56 Ibid.

57 Ibid, p 224.

58 Ibid, p 225.

— Harold quickly thought of including a lake⁵⁹ — the development of Sissinghurst Gardens was a slow affair, that involved much doing and redoing.⁶⁰

To understand the making of Sissinghurst Gardens it is necessary to understand a little of Vita's background and life. Victoria "Vita" Mary Sackville-West was born on 8 March 1892, the only daughter of Victoria and Lionel Sackville-West. As was the practice of that time, Vita was born at home. In Vita's case, home happened to be one of the finest country estates in England, Knole House. Had Vita been male, she would have ultimately inherited Knole, and the peerage that went with it. When Vita's father died, however, the new owner of that property was Vita's uncle. Apart from her relationship with Harold, Knole was perhaps Vita's strongest attachment in life.⁶¹ Certainly, she never ceased lamenting its loss,⁶² and the creation of Sissinghurst Gardens was in part an attempt to fill that void.⁶³ But Vita did not, indeed could not have, accomplished this gargantuan task alone.

It is generally accepted that Harold was responsible for much of the design of Sissinghurst Gardens.⁶⁴ At the end of the Second World War, Vita wrote a verse mentioning the "garden that I made". In a subsequent letter to Harold she explained that,

[i]t isn't true about the garden that *I* made, because [you] made it really, with [your] design. . . I only planted things. The credit is entirely yours.⁶⁵

As Vita had a moderate income from her family, she could (just) afford to pursue her passions for writing and gardening, regardless of the irregular nature of their financial rewards. Harold, on the other hand, was (or at least felt) obliged to engage in work that provided more consistent remuneration (and perhaps more prestige).⁶⁶ This work frequently took him away from the country and Sissinghurst. Thus, while sporadically assisting in actual planting and the like, his role was more architectural.⁶⁷ The design aspect of Sissinghurst Gardens is, however, one of its strengths. Harold devoted much time to the planning of the garden's formal elements, while Vita, happiest in the garden itself, struggled to understand even the simplest drawn plan.⁶⁸ Even within her domain, Vita was not expert in all facets of gardening: "[s]he was not a plantsman. . . [s]he did not spend hours in her greenhouse. . . [rather] she enjoyed a string of gardeners who had been brought up to such things. . . She did. . . work hard, digging, planting, weeding. . . [s]he *always* did a lot of

59 J Brown, *Vita's Other World: A Gardening Biography of V Sackville-West*, Viking, Hammondswoth, 1985, p 139.

60 Ibid, p 178; Glendinning, above, n 55, p 292.

61 Glendinning, above, n 55, p 349; M Stevens, *V Sackville-West: A Critical Biography*, Michael Joseph Ltd, London, 1973, pp 24–25.

62 Glendinning, above, n 55, p 368; Stevens, above, n 61, p 26.

63 Glendinning, above, n 55, p 389; Brown, above, n 59, p 15.

64 N Nicolson, *Sissinghurst Castle: An Illustrated History*, Headley Brothers Ltd, London, 1964, p 45; N Nicolson, *Portrait of a Marriage*, Weidenfeld and Nicolson, London, 1973, p 203.

65 Glendinning, above, n 55, p 334.

66 J Brown, *Sissinghurst: Portrait of a Garden*, Weidenfeld & Nicolson, London, 1990, p 28.

67 Harold's hands on role increased in later life, as his outside work commitments decreased.

68 Brown, above, n 59, p 84.

pruning. . . Jack Vass [one of her enduring gardeners]. . . says that he usually had to replant anything she had planted while she wasn't looking".⁶⁹

That Sissinghurst Gardens was in all senses a mutual project is reflected in Harold's comment that "the essence of garden design. . . is the alternation of the element of expectation with the element of surprise",⁷⁰ "a perfect proportion between the classical and romantic".⁷¹ Vita provided the romance, the surprise, Harold the classical element. Her gardening was inspired by his design and his design was inspired by her gardening. Nonetheless, it has been said that the "grace and the magic of the Sissinghurst style" were Vita's,⁷² and that this (rather than her writing) was her "one magnificent act of creation".⁷³ Imagine however, that she and Harold had separated during their lifetime. Would she have seen her contribution to this fruit of their relationship as "special", and Harold's as mundane? It is clear *they* certainly did not see the garden as Vita's sole creation, simply because she was more physically involved with it. Others too have recognised the individual and indispensable contributions made by Vita and Harold to Sissinghurst:

How much the garden owed to the Nicolsons, and how well it symbolized their long devotion, the alliance of a slightly feminine man and a predominantly masculine woman, I understood when I visited it after their deaths. . . [it is] the living product of two sympathetic human minds.⁷⁴

The work of art that. . . [she] had the energy, tenacity, means and time to create was the garden at Sissinghurst. But this garden could not have been made without the classical taste of her husband. . . And a work of art does not spring up overnight. Sissinghurst's garden is the result of both their educations and experiences (and those of a good many other people as well).⁷⁵

Perhaps Vita and Harold's son, Nigel Nicolson, sums it up best in his classic, *Portrait of a Marriage*:

One day, perhaps, a book may be written about the making of the garden at Sissinghurst, and it could well bear the same title as this book, for the garden is a portrait of their marriage.⁷⁶

It is widely acknowledged that, in addition to Vita and Harold, there were numerous extraneous factors that influenced the creation of Sissinghurst Gardens. The obvious starting point, however, is Vita's family and upbringing. The considerable cost of developing and maintaining such a large garden was able to be met through a twist of fate that, while depriving Vita of Knole, provided her with sufficient income (and thus time) to devote herself to this creation. Relatively large sums of money were required not only for the purchase of land and plants but also to hire help as the garden grew, and the legacy of Vita's aristocratic heritage played its part in meeting these

⁶⁹ Ibid, pp 218-219.

⁷⁰ Ibid, p 72.

⁷¹ Ibid, p 131.

⁷² Glendinning, above, n 55, p 347.

⁷³ Ibid, p 302.

⁷⁴ P Quennell, *Customs and Characters: Contemporary Portraits*, Weidenfeld & Nicolson, 1982, p 42 in Brown, above, n 59, p 13.

⁷⁵ Brown, above, n 59, p 15.

⁷⁶ Nicolson, *Portrait of a Marriage*, above, n 64, p 203.

expenses.⁷⁷ On having her first gardener supplied for her by her mother (at Vita's previous property, Long Barn), Vita said "I love the garden now that I don't have to struggle with the clay myself!"⁷⁸ She well knew that "[g]ardening is a luxury occupation; an ornament, not a necessity, of life".⁷⁹ Vita was accustomed to luxury, having grown up in an extraordinarily luxurious environment. Were it not for the influence of Knole ("a house full of flowers"⁸⁰) and its magnificent gardens, who can say whether Vita would ever have embarked on this project.⁸¹ And would Vita have bothered to exercise any special gardening skills had she in fact inherited Knole?

Vita's aristocratic origins also exposed her to many other beautiful gardens. One of her favourites was Marie Antoinette's pavilion, La Bagatelle, in the Bois de Boulogne.⁸² Not every child has the opportunity, as Vita did, to spend many summer holidays in such a sophisticated rural retreat! In fact, throughout their lifetimes both Vita and Harold were able to indulge in regular and rather exotic trips abroad. Vita, who first visited Florence at the age of 17, "absorbed, whether she knew it or not, the feelings of the best Italian gardens of the Renaissance"⁸³ and later "Persian gardens were the bacallaureate of Vita the gardener".⁸⁴

The circles that Vita and Harold moved in not only exposed them to lovely gardens, but also allowed them to develop friendships with the kind of people who could assist in Sissinghurst's development. Albert Powys, an architect involved in the refurbishment of the buildings at Sissinghurst, gave Harold advice on garden design and himself designed the west garden wall of the Rondel garden.⁸⁵ "[His] wall gives form and presence to the Rondel Garden, which would have been a dismal space indeed with just a straight wall as Vita wanted".⁸⁶ While Edwin Lutyens (another architect) was not involved specifically with Sissinghurst, he had an enormous influence on Harold's philosophy of garden design.⁸⁷ What, asks Brown, would Sissinghurst have become had the Nicolsons had the money to employ Lutyens, who by that time was engaged in much larger enterprises?⁸⁸ And what of Gertrude Jekyll's influence? Much of Miss Jekyll's famous garden at Munstead Wood "appear[ed] in Vita's gardening sooner or later; and [Vita] seems to have been immediately influenced by Miss Jekyll's taste in roses".⁸⁹ Edward Ashdown

77 Vita's mother not only left her a sizeable inheritance including valuable ornaments for the garden, she had settled money on the couple when first married (although Harold and Vita renounced any claim to this in 1929), hired Vita's first gardener, provided indoor and outdoor furniture and so on.

78 Brown, above, n 59, p 69.

79 Ibid, p 220.

80 Ibid, p 24.

81 As Jane Brown points out, gardening was "a peculiarly private passion of the Sackvilles", in Brown, above, n 59, p 12.

82 Ibid, p 44.

83 Ibid, p 45.

84 Ibid, p 84.

85 Brown says that, in fact, "[m]ore of his ideas were used than he is usually given credit for" in Brown, above, n 59, p 130.

86 Ibid, p 127.

87 Ibid, p 69.

88 Ibid, p 127.

89 Ibid, p 67.

Bunyard, author of the classic, *Old Garden Roses*,⁹⁰ the famous gardeners William Robinson⁹¹ and Norah Lindsay⁹² and the nurseryman Colonel Hoare Grey,⁹³ who suggested and provided many exotic plants, are some of the other names that deserve recognition when talking of Sissinghurst Gardens.

Vita's sexuality also played its part in Sissinghurst's development. Vita and Harold, though very much in love, were both more physically attracted to members of their own sex. Vita formed strong attachments with women and, while she was constantly forging new relationships, many of her lovers saw Vita as their one grand passion: they became almost devoted to her. Whilst fidelity was not Vita's strongest suit, she did not discourage these allegiances. Consequently, Vita often found herself with female guests at Sissinghurst and over the years these women assisted Vita in the piecemeal creation of Sissinghurst Gardens.⁹⁴ One of these women even "spotted the advertisement for a sixteenth-century castle in Kent, and it was she who took Vita. . . to look round".⁹⁵

And then there were the paying visitors. Sissinghurst Gardens was opened to the public for viewing on a regular basis after the Second World War, with a one shilling entrance fee.⁹⁶ By 1954 the annual revenue was in the vicinity of £1400.⁹⁷ While Vita enjoyed the public appreciation of the garden, the growing costs of maintaining it were to some extent able to be defrayed by these "shillingses".

A little digging thus reveals that Sissinghurst Gardens was not the sole creation of one brilliant gardener. If anything, it is a perfect example of the haphazard nature of the creative process. The injury caused by Treyvaud J's analogy does not end with its inaccuracy, however. Perhaps the ultimate irony is that the work of such an ardent feminist (though she might not have labelled herself as such) should be used as the rationale for devaluing the contribution women make to family life. While Vita eschewed many traditional practices and railed against women's inferior societal status, in her own way she (and Harold) believed in marriage.⁹⁸ Not marriage in its conventional form but rather as a true partnership between "people of strong character and independent minds",⁹⁹ which is how she and Harold approached their own unconventional relationship. One of Vita's frequent complaints of traditional marriage was its tendency to "rob her of her personal identity".¹⁰⁰ She rebelled when required to describe herself as "Mrs Harold Nicolson":

90 Her mentor with respect to roses: Brown, above, n 59, p 131.

91 "[H]is influence pervades the whole of Sissinghurst": Brown, above, n 59, p 120.

92 Ibid, p 49.

93 Ibid, p 121.

94 For example, see Glendinning, above, n 55, p 239.

95 Brown, above, n 59, p 109.

96 Glendinning, above, n 55, p 356.

97 Ibid, p 380.

98 Watson has argued that "[a]lthough Vita liked the *fact* of marriage, she detested it as an institution": S Watson, *V Sackville-West*, Twayne Publishers Inc, New York, 1972, p 25. This seems at odds, though, with Vita's own comments on the subject. It was more likely the trappings that came with marriage that she abhorred, as she seemed greatly in favour of her ideal version of marriage.

99 Nicolson, *Portrait of a Marriage*, above n 64, p 176.

100 Stevens, above, n 61, p 46.

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This, as always, has flung me into a rage. You know I love you more than anybody has ever loved anybody else, but I really do resent being treated as if I were your dog. The whole thing is an insult to human dignity, and ought to be revised. One is allowed no separate existence at all, but merely as a dependent upon whomever one marries. Why not get me a collar with your name and address engraved on it?¹⁰¹

Vita, undeniably a person of strong character and independent mind, did not let her marriage to Harold dilute her personal identity, nor did her success weaken Harold's. The Family Court, however, has, through its traditional interpretation of the concept of marriage, tried to rob Mrs Ferraro and Wendy Whiteley of their independent existence. Their's was a secondary role in the relationship, their partnership unequal, and all because their unions were particularly fruitful.

Conclusion? Equality!

Gold may mean different things to different men.
To one man, it could mean the Golden Bell,
Forsythia suspensa, hanging yellow
Along bare branches, such a natural gold
Paying no dividend. . . ?¹⁰²

It is not often the case with family law matters that an alternative solution to a problem readily presents itself. Those matters that continue to vex judges and academics do so usually because the implementation of theory in this highly personal arena is often fraught with practical obstacles. In this case, however, the alternative is clear and easy to implement. Where you have a long marriage and both parties have fulfilled their respective roles of breadwinner and homemaker to the best of their ability, as the Whiteleys and Ferraros did, then the mere fact of a very large pool of assets should not warrant a different outcome from that where the assets are more moderate. This is not to say that the court cannot recognise varying degrees of contribution. But the Family Court is not recognising contribution in the "special skill" cases, it is rewarding financial success. To reward wealth creation in this way is to say that the only, or at least the most important, measure of contribution is monetary. It may be the easiest, but the Family Law Act 1975 specifically reminds us that there are other measures when it points out that contributions to family welfare are inherently valuable. After all, has the best tennis player in the world *really* contributed any more to his/her relationship than the best mother? It is sad enough that society divides its financial rewards so unevenly, without the Family Court doubly rewarding those at the top of the money pile simply because they happen to be there. And the reality is that the biggest "earners" in our society continue to be predominantly male. Women are still expected to, and do, subordinate their careers to those of their partners and yet they are penalised financially when the fruits of their combined labour happen to be very substantial.

The answer is to do away with the "special skill" exception, which as we have seen is not based on skill but rather on wealth. It is not logical, nor is it

101 Ibid, p 46.

102 Sackville-West, above, n 61, p 28.

just and equitable. It makes a mockery of the court's obligation to give proper recognition to the value of contributions to the welfare of the family. It perpetuates the myth that a homemaker's lot is an easy one, not "real work"—all tennis and tea parties. Evidence of the unequal application of this "special skill" principle is not hard to find. For example, if we are to give extra recognition to the extraordinary success of some breadwinners why do we not equally recognise their extraordinary failures?¹⁰³ Why do we not see breadwinners having their share of the assets reduced when they fail to exploit their earning potential, just as women are judged as either good, indifferent or bad homemakers? Unless a breadwinner simply fails to win any bread, or perhaps wastes the bread he wins, his contribution is assumed to be the best he could have achieved. As long as you are earning (and not wasting) then you start at 100 per cent — the only way is up (as the Mr Ferraros of the world have learned). In contrast, one does not see cases where the homemaker *par excellence* pitted against the average breadwinner is recognised as having made a greater than 50 per cent contribution. If the world's best homemakers marry ordinary breadwinners, the division based on contribution after a lengthy union is still likely to be equality. It is patent that despite s 79(4)(c) the Family Court believes that the best homemakers are never equal to the best breadwinners.

The apparent gender neutrality of the "special skills" exception provides no grounds for the retention of this rule either. Yes, it is possible that there would be cases where the roles were reversed — Claudia Schiffer meets Mr Mom. The rule would still operate unfairly, however, in respect of the devoted, long-suffering homemaker. The fact remains, of course, that women are usually found in this position, and legal history shows us this is no coincidence.

In Vita's last novel, *No Signposts in the Sea*, she reminds us that marriage depends upon "the practice of mutual respect".¹⁰⁴ In championing mutual respect, Vita is talking about a couple respecting each other *during* their marriage, but this is rightly translated by s 79(4)(c) into respect for women's contributions to marriage *after* separation. If the Messrs Ferraros and Whiteleys of the world choose on separation not to respect their wives' contributions to their relationships, then it is the court's *duty* to step in and ensure that the parties' financial settlement shows proper respect for the contributions made by those women. Though not much of a homemaker herself (in the traditional sense), Vita respected what is essentially "women's work":

The soul of a house, the atmosphere of a house, are as much part of the house as the architecture of that house or as the furnishings within it. Divorced from its life it dies. But if it keeps its life it means that the kitchen still provides food for the inhabitants; makes jam, puts fruit into bottles, stores the honey, [and] dries the herbs.¹⁰⁵

In her own time Vita felt the sting of being deprived of a substantial

¹⁰³ In *In the Marriage of Ferraro* (1992) 16 Fam LR 1 at 38; (1993) FLC 92-335 at 79,580 the Full Court acknowledges that these losses are normally shared equally.

¹⁰⁴ V Sackville-West, *No Signposts in the Sea*, Michael Joseph Ltd, London, 1965, p 89.

¹⁰⁵ V Sackville-West, *English Country Houses*, William Collins, London, 1941, p 47.

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inheritance and her home because of her sex. To be used posthumously as justification for a principle that devalues women's work simply because women do it, adds insult to the grave injury she has already sustained. It is also a sad indicator of the continuing reluctance of our legal system to see life from anything other than an essentially male perspective. The Family Court could do a lot worse than to reflect on Vita's attitudes to marriage and gardening and the true story of Sissinghurst Gardens next time they come to reconsider the "special skill" exception. Vita may not have fitted the typical mould of mother/wife — a lesbian in breeches who struggled with motherhood and her sometimes uncontrollable *wanderlust* — but she managed, with Harold, her true soul mate, to create a marriage and a garden whose beauty and value have long outlived their makers.