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# FAMILY LAW PROPERTY SETTLEMENTS: A LIBERAL THEORETICAL FRAMEWORK FOR LAW REFORM

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*This article sets out a law reform framework for family property settlements, drawn expressly from a theoretical foundation. It applies Rawls' theory of justice, which falls under a liberal philosophical umbrella. It explains the choice of a liberal theory for use in family property settlements and constituent elements of Rawls' theory of justice. Drawn from Rawls' theory, four foundation principles emerge. These are the rule of law (including transparency, consistency, and clear purpose), non-discrimination between spouses, recognition of financial disadvantage, and priority to the economic interests of children. From those principles, this article constructs the elements of a potential alternative property settlement law combining pre-conditions to a rule of equal division while retaining judicial discretion for specific purposes.*

## I INTRODUCTION

Current parallel inquiries in Australia and New Zealand explore fundamental questions about just outcomes for alteration of property following marriage or de-facto relationship breakdown ('family law property settlements').[1] Each inquiry is due to report to their respective governments in 2019.[2] The Australian Law Reform Commission ('ALRC') Inquiry's terms of reference cover almost all elements of the family law system,[3] but include the question (in family property cases) of 'what changes could be made…to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?'[4]

The exclusive focus of New Zealand's inquiry is family property division.[5] Their preferred approach paper ('the preferred approach paper') directly addresses the policy underpinnings of their legislation, basing proposed reform on a theory that, subject to eligibility criteria, a marriage or de-facto relationship is a family joint venture.[6] The expectation is that each partner

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[1] Australian Law Reform Commission, *Review of the Family Law System* (31 May 2018) <https://www.alrc.gov.au/inquiries/family-law-system>; Law Commission New Zealand, *Review of the Property (Relationships) Act 1976* <https://lawcom.govt.nz/our-projects/review-property-relationships-act-1976>.

[2] Australian Law Reform Commission, 'Review of the Family Law System' (Issues Paper 48 (IP48), March 2018) 3-5 <https://www.alrc.gov.au/sites/default/files/pdfs/publications/issues_paer_48_19_march_2018_.pdf>

[3] Ibid; Law Commission New Zealand, above n 1.

[4] Australian Law Reform Commission, Review of the Family Law System: Questions, 8 (Question 18) <https://www.alrc.gov.au/sites/default/files/pdfs/publications/ip48_list_of_questions.pdf>.

[5] Law Commission New Zealand, above n 1.

[6] Law Commission New Zealand, 'Review of the Property (Relationships) Act 1976: Preferred Approach/Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai' (Issues Paper 44, Law Commission, November 2018) <https://lawcom.govt.nz/sites/default/files/projectAvailableFormats/PRA%20-%20Preferred%20Approach%20-%20Issue%20Paper%2044%20-%20Final.pdf>.

'will continue to share in the fruits of that joint venture – the product of their combined contributions – into the future.'[7] This family joint venture proposal is the central underpinning theory of a reformed law, together with removing compensation theory from the existing legislation.[8]

This article presents the theoretical underpinnings and the structural components of an alternative family property settlement law for Australia, based on Rawls' theory of justice. Rawls' theory consists of two fundamental principles. The first principle is of equal rights and liberties.[9] These rights include the priority of the rule of law.[10] The second principle promotes distribution of social goods to the greatest expected benefit of the least advantaged, subject to providing the greatest possible benefit for the least well off.[11] Rawls describes these principles as an egalitarian form of liberalism.[12]

With the ALRC report due in 2019, and a likely Commonwealth Government response to follow, the opportunity remains to discuss alternative laws and a philosophical basis for change. The ALRC's recent discussion paper presents a process action plan based on a 'public health approach'.[13] On making family law property settlements fairer, the ALRC avoids discussing theoretical foundations for property settlements, concluding that the case had not been made out for a shift from a discretionary system to a prescriptive one 'before further research is undertaken about property adjustment on relationship breakdown.'[14]

This article directly addresses the absence of a theoretical foundation for reform of the law for alteration of property interests, then presents a detailed model drawn from an express philosophical basis. The proposed law divides all property equally between spouse parties as a rule (not a presumption), then further adjusts based on future economic factors, directed mostly to the economic priorities of children, with a variable cap on the overall result. It includes all of the spouses' property, irrespective of the circumstances of acquisition.

The model rests on the meeting of preconditions. The first is the existence of a marriage or de-facto relationship.[15] The second is care of dependent children during the marriage or de-facto relationship, whether children of that relationship or prior relationships. The third is the absence of a financial agreement concerning the parties' financial matters. This fourth pre-condition is the duration of the marriage or de-facto relationship, which, by coincidence, is similar in content to the current preferred New Zealand reform proposal. However, this article's model rests on a different theoretical foundation to the New Zealand model, the central principle that certain facts and circumstances of the parties deem equality as fundamental to the spouse parties' association, irrespective of the circumstances of acquisition of property.

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[7] Ibid 21.
[8] Ibid.
[9] John Rawls, *Political Liberalism (Expanded Edition)* (Columbia University Press, 2005) 5.
[10] John Rawls, *A Theory of Justice (Revised Edition)* (Harvard University Press 1999) 37-38.
[11] Ibid 72.
[12] Rawls, above n 9, 6.
[13] Australian Law Reform Commission, 'Review of the Family Law System' (Discussion Paper No 86, 2 October 2018) 13 <https://www.alrc.gov.au/sites/default/files/dp86_review_of_the_family_law_system_4.pdf>.
[14] Ibid 61.
[15] *Family Law Act 1975* (Cth) s 90SB.

The model contains specific objects and principles, including a statement of non-discrimination between parents, a continuation of equality, and consistency of decision-making. Such purposes provide guidance and transparency. Third, the model is predictable, by setting out a reasoning sequence for determining applications and capping unequal division of property. Fourth, the model directs a court to give weight to the financial consequences of separation, recognising economic disadvantage as between spouses in separated families. It increases the unequal division of property when there is less property to divide. It includes a specific mechanism to implement priority and weight to the financial interests of children. Finally, the model is more transparent than by separating the discretion for the type of property each spouse receives from the quantum.

The model does not include family violence. Such an exclusion is not a statement that family violence is irrelevant. Instead, the model's structure easily facilitates the addition of family violence in determining an unequal property division. This article intentionally avoids answering the question of the inclusion of family violence. Given the substantial literature on the subject,[16] this question deserves its own, separate, discussion.

Presentation of this alternative model is the third (and final) of the writer's series exploring section 79's practical effect and significant shortcomings.[17] Without repeating those analyses, this article begins by briefly revisiting the current judicial discretion for alteration of property interests, then the writer's critique of the present system arising from a quantitative analysis of judicial decisions,[18] and discussion of discretion at an appellate level.[19] Following this is the justification for the use of a particular form of liberal theory. Such a choice rests on the surprisingly liberal nature of some financial parts of the *Family Law Act 1979* (Cth) ('the *Act'*) today, through the absence of compulsion to settle property, and the priority of financial agreements over judicial discretion. It also rests on existing international scholarship applying liberal theoretical principles to family law.

The next step on from the choice of contemporary liberal theory is a specific explanation of Rawls' theory of justice, both in its general application and specifically concerning matrimonial property. From Rawls, four relevant applicable principles of justice emerge. The principles are the rule of law, recognition of non-discrimination, adjustment for economic inequality for specific purposes, and priority to the economic interests of children. This article then sets out the model's particulars. The proposed model is a step forward, drawn clearly from a sound theoretical foundation, to achieve justice (especially in negotiated settlements) without disturbing the surrounding liberal structure of the *Act*.

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[16] See, for eg, Helen Rhoades, Charlotte Frew and Shurlee Swain, 'Recognition of Violence in the Australian Family Law System: A Long Journey' (2010) 24 *Australian Journal of Family Law* 296; Sarah Middleton, 'Matrimonial Property Reform: Legislating for the 'Financial Consequences' of Domestic Violence' (2005) 19 *Australian Journal of Family Law* 9; Nell Alves-Perini, Margaret Harrison, Helen Rhoades and Shurlee Swain, 'Finding Fault in Marital Property Law: A Little Bit of History Repeating?' (2006) 34(3) *Federal Law Review* 377; Family Law Council, Letter of Advice, *Violence and Property Proceedings* (August 2001); Brian Knox SC, 'Revisiting Kennon: Financial Remedies for Family Violence' (Paper Presented at National Family Law Conference, Melbourne, 21 October 2016).

[17] Christopher Turnbull, 'Family Law Property Settlements: An Exploratory Quantitative Analysis' (2018) 7 *Family Law Review* 215; Christopher Turnbull, 'In Metes and Bounds: Revisiting the Just and Equitable Requirement in Family Law Property Settlements' (2018) 31 *Australian Journal of Family Law* 159.

[18] Turnbull, 'Family Law Property Settlements' above n 17.

[19] Turnbull, 'In Metes and Bounds', above n 17.

## II EXISTING JUDICIAL DISCRETION

A court shall not make an order altering the property of spouse parties unless it is satisfied that the proposed order is 'just and equitable.'[20] The expression 'just and equitable' is a qualitative description of the conclusion reached.[21] The just and equitable requirement is 'overriding',[22] general in application,[23] and not exercised by the use of fixed rules.[24] The discretion is a wide one, [25] informed by general principles laid down in the *Act* (which apply to all cases).[26] Relevant principles are the need to protect the institution of marriage,[27] and a duty to end the financial relationship between the parties.[28] If a court is satisfied that it is just and equitable to make any order,[29] a court shall, in determining what order should be made,[30] consider and take into account the direct and indirect financial and non-financial contributions to the property of the parties, or either of them, [31] and homemaker and parenting contributions.[32] Upon determining a contribution-based entitlement,[33] a court considers a series of other factors including child support,[34] age and health,[35] income and financial resources,[36] duration of the marriage,[37] the effect of the proposed order on the earning capacity of either party,[38] and any other fact or circumstance the court considers appropriate.[39] A court reviews its findings to ensure that the form of order is just and equitable,[40] and in so takes in account any other relevant facts and circumstances,[41] provided clear reasons reconcile the additional factors with the result.[42]

## III SHORTCOMINGS

[20] *Family Law Act 1975* (Cth) s 79(2). Unless otherwise stated, any reference to *Family Law Act 1975* (Cth) s 79 is a reference to the equivalent *Family Law Act 1975* (Cth) s 90SM; a reference to *Family Law Act 1975* (Cth) s 75(2) is a reference to *Family Law Act 1975* (Cth) s 90SF(3).
[21] *Stanford v Stanford* (2012) 247 CLR 108, 120.
[22] *Mallet v Mallet* (1984) 156 CLR 605, 647.
[23] *Norbis v Norbis* (186) 161 CLR 513, 518.
[24] Ibid 608.
[25] *De Winter v De Winter* (1979) FLC ¶78-087.
[26] *R v Watson; Ex Parte Armstrong* (1976) 136 CLR 248, 257.
[27] *Family Law Act 1975* (Cth) s 43(1)(a).
[28] Ibid s 81.
[29] *Chapman & Chapman* (2014) FLC ¶93-592, 79-271. See also *Fielding & Nichol* (2014) FLC ¶93-617, 79-631; *Chancellor & McCoy* (2016) FLC ¶93-752; *Whent & Marbrand* [2018] FamCAFC 95 (25 May 2018).
[30] *Family Law Act 1975 (Cth)* s 79(4).
[31] Ibid ss 79(4)(a), 79(4)(b).
[32] Ibid s 79(4)(c).
[33] *Hickey & Hickey & Attorney-General for the Commonwealth of Australia (Intervener)* (2003) FLC ¶93-143, 78-386.
[34] *Family Law Act 1975* (Cth) s 79(4)(g).
[35] Ibid s 75(2)(a).
[36] Ibid s 75(2)(b).
[37] Ibid s 75(2)(k).
[38] Ibid s 79(4)(d).
[39] Ibid s 75(2)(o).
[40] *JEL & DDF* (2001) FLC ¶93-075.
[41] See, for eg, *Phillips & Phillips* (2002) FLC ¶93-104, 88-986; *Myerthall & Myerthall* (1977) FLC ¶90-273; *Bevan & Bevan* (2014) FLC ¶93-572.
[42] *Manolis & Manolis (No. 2)* [2011] FamCAFC 105 (13 May 2011) [66].

Discerning a purpose, rationale or theory for alteration of property interests is near impossible. Parkinson describes family law today as a 'practice without a theory.'[43] No provisions in the *Act* contain objects and principles specifically applicable to alteration of property interests.[44] 'Just and equitable' has no independent definition. Historical analysis of the 'just and equitable' concept suggests three elements. The first is that if a spouse contributes a particular item of property (for example a house or a business), then such contributions should be given weight if that spouse seeks to retain that *particular* property.[45] Second, the use of the phrase 'just and equitable' was to prevent consequential injustice to a spouse or a child if the property was unaltered.[46] Third, the 'just and equitable' concept was a means of dealing fully and finally with the financial matters arising out of the end of the marriage.[47] Two suggested rationales underpinning the just and equitable requirement are firstly, the fact of marriage as the circumstances for a court to intervene in the spouse's respective legal titles and rights, and secondly, remedying of the economic injustice in the absence of an order.[48] It should not be necessary to examine 1950's High Court decisions to infer legislative intent. The absence of clear parliamentary intent alone justifies reform.

Description of the judicial discretion to alter the property of spouses is 'classic' in the sense that no one consideration (or combination of them) is necessarily determinative of the result.[49] Such a description takes on particular significance when considering the economic interests of children. Multiple factors in sections 79(4) and 75(2) of the *Act* concern children, including parenting contributions,[50] child support,[51] care of children,[52] desire to retain a role as a parent,[53] and necessary commitments to enable support of a child.[54] A classic judicial discretion; however, in the way described, could take any one of the other facts and circumstances mentioned in sections 79(4) and 75(2) of the *Act* and give them weight. If there were adequate reasons to do so, a court could give no weight to any factor relating to children.

In any event, the 'classic' description of judicial discretion does not go far enough to explain the breadth of judicial discretion conferred by section 79(2) of the *Act*. Such a "classic" description might be the case if there were limitations on the factors to take into account, or even a compulsion to consider each of the relevant actors stated in section 79(4) of the *Act*. Recent appellate jurisprudence suggests neither standard applies. In *Whent & Marbrand* the trial judge examined a long list of factors, of which several fell outside the text of section 79(4) of the *Act* including: the characterisation of the parties' relationship by financial autonomy and independence, the loans between the parties, and the lack of provision for each other in their

[43] Patrick Parkinson, 'Why Are Decisions on Family Property so Inconsistent' (2016) 90 *Australian Law Journal* 498, 523.
[44] *Family Law Act 1975* (Cth) Part VIII; Part VIIIAA; Part VIIIAB; Part VIIIB.
[45] *Sanders v Sanders* (1967) 116 CLR 366, 380–1 citing *Lansell v Lansell* (1964) 110 CLR 353, 361; See generally Turnbull, 'In Metes and Bounds' above n 17, 165.
[46] Ibid.
[47] Ibid.
[48] Turnbull, 'In Metes and Bounds', above n 17, 170.
[49] *Bevan & Bevan* (2014) FLC 95-572, 79-023, citing *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194.
[50] *Family Law Act 1975* (Cth) s 79(4)(c).
[51] Ibid s 79(4)(g).
[52] Ibid s 75(2)(c).
[53] Ibid s 75(2)(l).
[54] Ibid s 75(2)(d).

respective wills.[55] The Full Court (Strickland, Ainslie-Wallace and Foster JJ) affirmed the validity of this process, applying some similar decisions.[56]

The state of the Full Court jurisprudence appears to be that two groups of factors outside the text of the *Act* bookend the exercise of discretion. The first set is those just described to determine whether it is just and equitable to make any order. The second are those factors which impact on the ultimate form of the order after considering section 79(4) of the *Act*: the desire to maintain a home to accommodate children,[57] the emotional impact upon a person of selling a house,[58] and representations made about the future use of the property.[59] These collation of decisions reflect the plurality of the High Court's view, describing the just and equitable requirement as without 'metes and bounds'.[60] Also, Fehlberg and Sarmas recently pointed out, '[t]he physical structure of the legislation thus *encourages* (but does not *require*) contributions to property to be considered first'.[61]

It follows from the above discussion that it is not possible to import into section 79 of the *Act* a binding requirement against discrimination between spouses. A substantial body of literature indeed identifies a partnership theme in family property settlement law,[62] a review of which is outside the scope of this article. There may still be some appellate jurisprudence pointing to the need to avoid gender discrimination (and by extension an acknowledgment of marriage as a partnership). The Full Court (Faulks DCJ, Murphy & Watts JJ) in *Hoffman & Hoffman* endorsed the principles that it is implicit in many sections in Part VIII of the *Act* that parties to a marriage are equal in status, and that the general neutral language of the *Act* neither discriminates against nor advantages a particular spouse.[63] The very nature of inherent values is that they are not express and, while the statements of general application are worthy, they do nothing to assist in determining the final result.

The present state of the judicial discretion conferred by section 79 of the *Act* is, therefore, one with six identifiable shortcomings. First, there is no compulsion to consider any factors in section 79(4) of the *Act* in dismissing an application. Second, there is no mandated sequence in which to consider factors. Third, there is no direction on the weight given to any particular consideration. Fourth, there is no express principle of non-discrimination. Fifth, the economic interests of children are often mentioned but carry no specific weight. Sixth, the judicial discretion has no definable boundaries.

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[55] *Whent & Marbrand* [2018] FamCAFC 95 (25 May 2018) [8].
[56] Ibid [21]; see also *Chapman & Chapman* (2014) FLC ¶93-592.
[57] *Phillips & Phillips* (2002) FLC ¶93-104, 88-986. See also *Myerthall & Myerthall* (1977) FLC ¶90-273.
[58] *Stanford & Stanford* (2012) FLC ¶93-495, 86-314.
[59] *Bevan & Bevan* (2014) FLC ¶93-572, 79-029 - 79-030.
[60] *Stanford v Stanford* (2012) 247 CLR 108, 120.
[61] Belinda Fehlberg and Lisa Sarmas 'Australian Family Property Law: 'Just and Equitable' Outcomes? (2018) 32 *Australian Journal of Family Law* 81, 85 [original emphasis].
[62] See, for eg, Patrick Parkinson, 'Judicial Discretion, the Homemaker Contribution and Assets Acquired After Separation' (2001) 15(2) *Australian Journal of Family Law* 155, 166; Belinda Felhberg, '"With All My Worldly Goods I Thee Endow?" The Partnership Theme in Australian Matrimonial Property Law' (2005) 19 *International Journal of Law, Policy and the Family* 176, 180; Patrick Parkinson, 'Quantifying the Homemaker Contribution in Family Property Law' (2003) 31 (1) *Federal Law Review* 1; Helen Rhoades, 'Equality, Needs and Bad Behaviour: The 'Other' Decision-Making Approaches in Australian Matrimonial Property Cases' (2005) 19 *International Journal of Law, Policy and the Family* 194. See generally *Farmer & Bramley* (2000) FLC ¶93-060.
[63] *Hoffman & Hoffman* (2014) FLC ¶93-591, 79-260-79-261.

Despite these difficulties at a conceptual level, it may be the case that property settlement decisions are consistent and predictable at first instance. A best-practice approach to the regular application of judicial discretion might reflect principles such as even-handedness and consistency, predictability and certainty, procedural rules, neutral principles, and the avoidance of any generalised notion of fairness.[64] The need for an understanding of the on-the-ground outcomes justifies an inquiry into the reasoning process and results of first-instance judgments.

The author's exploratory analysis of first-instance judicial decision-making points to significant inconsistencies.[65] Any data is subject to the acknowledgement that almost all cases resolve without the need for final judicial determination. In 2017-2018, the Family Court of Australia finalised 534 contested final orders cases compared to 13,962 consent orders applications.[66] In that same year, the Federal Circuit Court of Australia (which does not have a consent orders application process) resolved 75 per cent of its cases before a trial.[67]

The author's sample of 200 first-instance decisions encountered four different approaches to findings of the property of the parties and three distinct methods for determining contributions and section 75(2) factors. [68] The range of results was an award between zero per cent and 100 per cent.[69] Subject to all of the qualifications expressed in that study, [70] section 79 of the *Act* as applied in that particular sample appears to permit any number of permutations or combinations of judicial reasoning processes, producing the broadest possible range of results.

If the author's findings are indeed reflective of judicial decisions as a whole, then the actual exercise of discretion falls short of the standards of predictability and certainty. Accordingly, at its worst, section 79 of the *Act* appears devoid of discernible purpose, and potentially applied in an unconstructed, unpredictable fashion. If true, reform is long overdue.

## IV WHY A LIBERAL THEORY?

At first glance, it may seem incongruous to consider the *Act* as liberal. For the choice of liberal theory in this family law property context, liberal theory is a modern, or contemporary liberal theory, and is neither classical nor utilitarian. It is in this form that this article uses the terms 'liberal' or 'liberal theory.' This definition requires explanation in legal and theoretical contexts. In property settlement cases, section 79 of the *Act* intrudes into the private sphere of marriage, and its breakdown looks behind the law of property (and equitable title) and intervenes in a way that ordinarily produces a different outcome. There is, however, no compulsion for separated spouses to complete a property settlement. They may, if they so elect, retain their joint property for the rest of their lives, or divide or sell any property, they without legal intervention. Resolution of property matters is neither a pre-condition to divorce, remarriage, or entry into a de-facto relationship. The only known example of compulsion in financial matters is in social security, where a person with dependent children to receive an income-tested pension or benefit, must take reasonable steps to obtain child support.[71]

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[64] Murray Gleeson, 'Individualised Justice – The Holy Grail' (1995) 69 *Australian Law Journal* 421, 431-432.
[65] Turnbull, 'Family Law Property Settlements' above n 17, 223.
[66] Family Court of Australia, *Annual Report 2017-2018* (2018) 25.
[67] Federal Circuit Court of Australia, *Annual Report 2017-2018* (2018) 3.
[68] Turnbull, 'Family Law Property Settlements' above n 17, 222, 224.
[69] Ibid 228.
[70] Turnbull, 'Family Law Property Settlements' above n 17, 218.
[71] Australian Government, *Guides to Social Policy Law, Family Assistance Guide Version 1.2017* (5 November 2018) <http://guides.dss.gov.au/family-assistance-guide/3/1/5/30>.

### A *Background: Historical Liberal Theory*

Strands of liberal historical theory enjoy quick exclusion. Section 79 of the *Act* does not, and could not, reflect natural law theory.[72] Mill wrote that persons should enjoy the freedom to pursue their good in their way, subject to not causing harm to others.[73] The intervention of the law in section 79 of the *Act* intervenes with and may eliminate, the ability of a person to peruse their future financial good. Locke wrote that the intervention of the state could only be for the good of society, that is, with the intention to preserve self, liberty and property.[74] Such laws are binding upon their proper establishment, enforced by independent judges who determine disputes only by law.[75] Section 79 of the *Act* neither preserves, protects or respects preservation of property. It cannot reflect Locke's classical liberalism.

However, remnants of utilitarianism persist in the binding financial agreement provisions in the *Act*. Utilitarianism provides that a legal system of good order enforce promises and guarantees expectations.[76] The law respects the autonomy of individuals to reach a concluded agreement. The moral obligation to enforce a promise rests on norms arising from the promisor.[77] The purpose is to enable people to have some control over their own lives.[78] The responsibility to be bound by a promise arises because one individual has 'intentionally invoked a convention' to expect performance of the terms of the other.[79] Principles of duress and unconscionability are essential, but not 'open-ended invitations to rearrange the understandings people have reached.'[80]

### B *Financial Agreements and Alteration of Property Interests*

It was not always the case that separated couples had the freedom to contract out entirely of the jurisdiction of a court under the *Act*. Section 87 agreements, which operated from the commencement of the *Act*, were only enforceable once approved by the Court.[81] Once an agreement was approved, it was in substitution for all rights under the *Act*. Parties to marriage could enter agreements.[82] There was no requirement for parties to be separated. The long-standing principle that pre-marital agreements were invalid precluded any agreement before

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[72] Suri Ratnapala, *Jurisprudence* (Cambridge University Press 2009) 213, citing Thomas Hobbes, *Leviathan or the matter, forme and power of a commonwealth ecclesiastical and civil* (Basil Blackwell, Oxford 1946) (1651); Hugo Grotious tr. FW Kelsey, *Prolegomena to the law of war and peace*, (Liberal Arts Press, 1957) (1625); Jean-Jacques Rosseau, *The Social Contract* (Penguin Books, Harmondsworth, 1968) (1762).

[73] John Stuart Mill, *On Liberty* (Harmondsworth: Penguin Classics 1974 [1859]) 71-72, See generally Wayne Morrison, *Jurisprudence: From the Greeks to the Post-Modern* (Routledge, 2016) 201-203.

[74] John Locke, 'The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government' §131, reproduced in John Locke and Ian Shapiro, *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press, 2003) 156-157.

[75] Ibid.

[76] Jeremy Bentham, *Principles of the Civil Code*, quoted in Paul Kelly, *Utilitarianism and Distributive Justice, Jeremy Bentham and the Civil Law* (Oxford, 1990) 87-88.

[77] Richard Craswell, 'Contract Law, Default Rules, and the Philosophy of Promising' (1989) 88 *Michigan Law Review* 489, 496, citing Neil MacCormack and Joseph Raz, 'Voluntary Obligations and Normative Powers' (1972) 46 *Proceedings of the Aristotelian Society, Supplementary Volumes* 59.

[78] Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) 369.

[79] Charles Fried, *Contract as a Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981) 16.

[80] Ibid 93.

[81] *Family Law Act 1975 (No. 53 of 1975)* (Cth) s 87.

[82] *Family Law Act 1975* (Cth), s. 4.

marriage.[83] Section 87 agreements could only be approved if their terms were proper.[84] Several factors were taken into account to determine whether the agreement was proper, including disclosure; fairness of content, capacity to implement, and understanding that the agreement was in substitution for their rights.[85] This regime prevented spouse parties from entering into any arrangement without judicial oversight.

The section 87 agreement regime ended and fundamentally changed, with the introduction of the current statutory system in the year 2000. Section 87 of the *Act* was grandfathered,[86] and replaced with a scheme for entry into a binding financial agreement (albeit one with multiple subsequent amendments and additions).[87] The critical difference (from a philosophical perspective) between the regimes was the removal of judicial oversight and the removal of any governance over the content of the agreement. For all agreements from the year 2000, if an agreement is a financial agreement within the meaning of the *Act*,[88] the financial matters relating to property exclude a court's jurisdiction under section 79 of the *Act*.[89] There are no provisions in the *Act* to set aside, vary, or discharge a financial agreement on the basis that the terms are unfair, unreasonable, or not just and equitable. Limited statutory grounds exist for setting aside a financial agreement including a material change in circumstances relating to a child,[90] and impracticability of implementing the financial agreement.[91]

The *Act*, however, imports and preserves common law principles of contracts, both in law and equity.[92] These a pre-requisite to considering statutory formalities.[93] The High Court decision of *Thorne v Kennedy*[94] demonstrates that there are no special or unique principles applicable to matrimonial-style agreements.[95] In the special leave application, Keane J raised precisely this issue.[96] It seems that the issue was not necessary to decide as the financial agreement was unenforceable arising by either presumed or actual undue influence,[97] or unconscionability,[98] on orthodox principles, save that the plurality provided some guidance on relevant factors. These factors are the absence of negotiation, emotional circumstances of entry, time for reflection, the nature of the parties' relationship, each party's financial position, and the independent advice received.[99]

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[83] *Hyman v Hyman* (1929) AC 601 HL; *Bennett v Bennett* (1952) 1 KB 249.
[84] *Family Law Act 1975 (No. 53 of 1975)* (Cth) s 87(4).
[85] *Wright and Wright* (1977) FLC ¶90-221.
[86] *Family Law Amendment Act 2000* (Cth) Sch 2, Item 9.
[87] Ibid Item 10. See, for eg, *Family Law Amendment Act 2003* (Cth), sch 5, Item 2. See also Explanatory Memorandum, Family Law Amendment Bill 2003 (Cth), 2-3; *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth).
[88] *Family Law Act 1975* (Cth) ss 90B, 90C, 90D. This article now adopts the term 'financial agreement'. The expression 'binding financial agreement', while often used, does not appear in the *Family Law Act 1975* (Cth).
[89] *Family Law Act 1975* (Cth) s 71A.
[90] Ibid s 90K(1)(d).
[91] Ibid s 90K(1)(c).
[92] Ibid s 90KA(a).
[93] *Senior & Anderson* (2011) FLC ¶93-470.
[94] *Thorne v Kennedy* (2017) FLC ¶93-807.
[95] See generally Kary Barnett, 'Thorne v Kennedy: A Thorn in the Side of "Binding Financial Agreements"?' (2018) 31(3) *Australian Journal of Family Law* 183; Matt Foley 'Setting Aside Financial Agreements – Duress, Undue Influence and Unconscionable Conduct' (Paper Presented as Legalwise Seminars, Brisbane, 23 November 2017).
[96] Thorne v Kennedy [2017] HCATrans 54 (10 March 2017); See also Sheridan Emerson, 'Under Pressure' (Paper Presented at Family Law Practitioners Association (Qld) Retreat, Brisbane, 12 May 2018).
[97] *Thorne v Kennedy* (2017) FLC ¶93-807, 77-736.
[98] Ibid 77-738.
[99] Ibid 77-335.

The Australian regime contrasts with the English approach, where a court has the discretion to find an agreement binding.[100] New Zealand's agreement regime also differs from Australia's, as the principles of contract and equity are preserved, with an additional power to set aside an agreement if, having regard to all the circumstances, giving effect to the agreement would cause serious injustice.[101]

Accordingly, a threat of utilitarianism runs through the Australia financial agreements regime. Agreements are prima facie valid and preserve and protect individual choices made between spouses, irrespective of the financial agreement's content. Such is the priority to financial agreements that their operation does not merely bind the parties, it excludes a court's jurisdiction altogether. The onus rests on an aggrieved party to prove a common law or equitable vitiating factor, and only limited statutory grounds apply otherwise.

Section 79 of the *Act* is subservient to a valid and binding financial agreement. Section 79 of the *Act*, while not itself liberal, is surrounded by provisions which, informed by liberal principles, operate to extinguish it altogether. It is in this sense that the financial provisions of the *Act* are structurally liberal.

### C *Can Liberal Theory Apply to Family Property Provisions?*

There are very few Australian references to any form of liberal theory applying to family law. Dewar described judicial discretion in property settlements as a form of technocratic liberalism.[102] It contained two elements: first, expertise to reach an optimal economic conclusion; and second, clear ground rules for application private sphere.[103] Saunders argued for the use of classical liberal theory for reform section 79 of the *Act*,[104] and considered Rawls' theory of justice as an alternative, but found it only another way of expressing a needs basis for distribution.[105]

Can contemporary liberal theory (defined in this article), and in particular Rawls' theory of justice apply to family property provisions? The answer is yes because others have done so. George's work, *Ideas and Debates in Family Law*, applies (amongst other principles) Rawlsian theory to family property law.[106] George sees Rawlsian justice not as equalising each party's long-term financial position after separation, but rather placing both parties on a suitable foundation of social and economic equality.[107] George takes Rawls' system of social co-operation (explored in this article shortly) and argues that Rawls' theory supports the law taking action to ensure the burden of raising children (in particular) is divided between spouses reasonably equally.[108]

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[100] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42; See generally Sharon Thompson, 'Levelling the Prenuptial Playing Field: Is Independent Legal Advice the Answer' (2011) *International Family Law* 327.
[101] *Property (Relationships) Act 1976* (NZ) ss 21J(1); 21J(3).
[102] John Dewar, 'Reducing Discretion in Family Law' (1997) *Australian Journal of Family Law* 309, 316.
[103] Ibid.
[104] Peter Saunders, 'What is a Fair Divorce Settlement?' (1999) 53 *Family Matters* 48, 49.
[105] Ibid.
[106] Rob George, *Ideas and Debates in Family Law* (Hart Publishing ebook, 2012).
[107] Ibid 18.
[108] Rob George, above n 106, Loc 2747.

George's analysis is in the English context of fairness (with components within it) being the overarching standard governing outcomes.[109] He argues against a generalised standard of fairness, instead the law ought to have a general stance of encouraging negotiation and settlement, provided that persons can make genuinely free choices, preventing the wrongful exercise of power by one spouse over another.[110] Ultimately, George states that it ought not to be the role of judges to determine principles of justice in family law property settlements and that it is a proper task for Parliament to do so. [111] Other scholars rely upon, at least in part, liberal or in particular Rawlsian concepts. Eekelaar, in his substantial work arguing for a complete abandonment of family law altogether, wrote that many of his assumptions would look similar to those of liberalism.[112] Henaghan concluded that Eekelaar's approach was Rawlsian,[113] to the extent that it provided public reason (in the sense that such reasoning is express and open to all).[114]

If the *Act* is, in its financial components, structurally liberal, and international literature applies Rawls' theory to inform structurally similar judicial discretion (as that in England), then the possibility arises of applying Rawls' theory to family property settlements. To do so successfully; however, requires explanation, then interrogation of Rawlsian principles.

## V RAWLS' THEORY OF JUSTICE

Rawls' theory of justice provides for the supremacy of (and non-interference with) political liberties, principally at a constitutional level. However, the theory permits the distribution of social goods (including opportunities, income and wealth),[115] at a legislative level subject to meeting pre-conditions and with limitations. Rawls' theory of justice is not utilitarian. Indeed, at the outset, Rawls sets out to carry to another level of abstraction social contract theory, such that the theory is 'no longer open to the more obvious objections thought fatal to it.'[116] Rawls sets out his theory as one which offers a systematic account of justice superior to utilitarianism.[117]

Rawls' theory of justice contains two fundamental principles. The first principle is that 'each person has a claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme, the equal political liberties, and only those liberties, are to be guaranteed their fair value.'[118] Such basic rights and liberties include the rule of law. The first element (the rule of law) forms part of Rawls fundamental rights and liberties, which have priority over other principles.[119] The second principle (the difference principle) is that the optimal arrangements of social and economic inequalities are that they are both: (a) to the greatest expected benefit of the least advantaged, subject to (b)

[109] See, for eg,*White v White* [2001] 1 All ER 1, [2001] 1 AC 596; *Miller v Miller; McFarlane v McFarlane* [2006] 3 All ER 1, [2006] UKHL 24.
[110] Rob George, above n 106, Loc 3122-3133.
[111] Ibid Loc 3164.
[112] John Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2006) vii.
[113] Mark Henaghan, 'The Normal Order of Family Law' (2008) 28 *Oxford Journal of Legal Studies* 165, citing John Dewar 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467.
[114] Ibid 181.
[115] John Rawls, *A Theory of Justice* (Harvard University Press ebook, 1971) 6; See also Rawls, above n 10, 79.
[116] Rawls, *A Theory of Justice*, above n 113, Loc 35.
[117] Ibid Loc 40.
[118] Rawls, above n 9, 5.
[119] Rawls, above n 10, 37-38.

providing the greatest possible benefit for the least well off.[120] The first principle has lexical priority over the second.[121] It must be positively satisfied before moving on to the second principle.[122] Rawls describes the two principles as an egalitarian form of liberalism.[123]

Rawls described the difference principle such that those who are naturally advantaged should be free to improve their good fortune, provided that they 'cover the costs of training and education and for using their endowments in ways that help the less fortunate as well.'[124] The difference principle in addressing social and economic inequalities is not essential at a constitutional level and is more amenable to a legislative level.[125]

These two principles rest upon Rawls view that uniform values that are binding upon all of us. These values do not arise because of an express undertaking between individuals, or between people and their governments. Instead, it derives from the notion of acceptance of them by people in an original position, a hypothetical state in which one does not know his (or her) place in society, class, social status, fortune (as meaning naturally advantaged), intelligence, and strength.[126] In such a situation, free and rational persons accept an initial position of equality as defining the fundamental terms of their association.[127] This central notion of human rationality underpins the equal scheme of fundamental rights and liberties.

Two entry points link Rawlsian theory to family property settlements. The first is that the original position is analogous to a de-facto relationship or a marriage in a particular way. While in the original position two persons are removed from their externalities, spouse parties intermingle their external circumstances. Ultimately, those terms of association could reach a point where the society, class, social status, or fortune of spouse parties no longer matter. Accordingly, there comes the point where equality defines, or ought to determine, the terms of the association between spouse parties. Such equality breaks down any connectivity between the structural nature of the relationship (for example whether the property is marital or otherwise) and accepts sharing of all of the property of the parties given the vicissitudes of life. The result is sharing equally in the benefit of gifts from family members, inheritances, windfalls, personal injury claims, redundancies, property brought into the relationship, and even a particular skill or acumen one party may possess. The considerable difficulty comes with defining the pre-conditions to that point.

Upon the existence of a marriage or a de-facto relationship,[128] the start is the knowledge of spouse parties to contract out of the *Act* and choosing not to. As the plurality in *Stanford v Stanford* commented, if two spouses consider, but elect not to contract out of the *Act*,[129] then there is an acceptance that the law will intervene in the financial matters of those spouses in the event of relationship breakdown. The second is children of the marriage or de-facto relationship, or care of children in blended families. Volumes of literature examine the financial

[120] Ibid 72.
[121] Ibid 37-38.
[122] Ibid 38.
[123] Rawls, above n 9, 6.
[124] Ibid 87.
[125] Ibid 228.
[126] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 11.
[127] Ibid.
[128] *Family Law Act 1975* (Cth) s 90SB.
[129] *Stanford v Stanford* (2012) 247 CLR 108,122.

consequences of the division of household labour, with the lost financial opportunities for career development, growth in superannuation, and earning capacity.[130]

The research demonstrates that, on balance, the consequences fall disproportionately on the spouse party who has primary responsibility or spends the majority of time caring for children, or has the most time out of the workforce. The factors, being the threshold of marriage or de-facto relationship, absence or contracting out, and care of children, all *read together*, point to a mutual life choice. That choice is to intermingle the financial and non-financial aspects of life to such an extent that it is no longer possible, or just, to retrospectively inquire into the value of each spouse party by assessment of their contributions. An additional factor, informing the New Zealand reform discussion, is the duration of the relationship. If all of the preceding three pre-conditions exist and persist for a lengthy period, how could it be just for one spouse party to argue that they never intended the other to be their financial equal? What this concept does is take what Rawls uses in a meta form for the foundation of a just society, and applies it in a personal way for a just financial result.

The second entry point is Rawls direct comments on entitlements on divorce. In *Political Liberalism (Expanded Edition),* he wrote:

> But a now common proposal is that as a norm or a guideline, the law should count a wife's work in raising children (when she bears that burden as is still common) as entitling her to an equal share in the income that her husband earns during the marriage. Should there be a divorce, she should have an equal share in the increased value of the family's assets during that time. Any departure from this norm would require a special and clear justification. It seems intolerably unjust that a husband may depart the family taking his earning power with him and leaving his wife and children far less advantaged than before. Forced to fend for themselves, their economic position is often precarious. A society that permits this does not care about women, much less about their equality, or even about their children, who are its future. [131]

Rawls did not directly link the conceptual to the personal in a way this article attempts, but wrote of the value of 'the freedom and equality of women, the equality of children as future citizens, the freedom of religion, and, finally, the value of the family in securing the orderly production and reproduction of society and of its culture from one generation to the next.'[132] No ambiguity exists here about applying Rawlsian theory to family property settlements. Rawls

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[130] See, eg, Peter McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice Hall, 1986); Australian Law Reform Commission, *Matrimonial Property*, Report No 39 (1987); Kathleen Funder, Margaret Harrison and Ruth Weston, *Settling Down: Pathways of Parents after Divorce* (Australian Institute of Family Studies, 1993); Sophy Bordow and Margaret Harrison, "Outcomes of Matrimonial Property Litigation: An Analysis of Family Court Cases" (1994) 8 *Australian Journal of Family Law* 264; Rosemary Hunter et al, *Legal Services in Family Law* (Justice Research Centre, Law Foundation of New South Wales, 2000); Grania Sheehan and Jody Hughes, *Division of Matrimonial Property in Australia: Research Paper No. 25* (Australian Institute of Family Studies, 2001); Nareeda Lewers, Helen Rhoades and Shurlee Swain, "Judicial and Couple approaches to Contributions and Property: The Dominance and Diffculties of a Reciprocity Model" (2007) 21 *Australian Journal of Family Law* 123; Grania Sheehan, April Chrzanowski and John Dewar, "Superannuation and Divorce in Australia: An Evaluation of Postreform Practice and Settlement Outcomes" (2008) 22 *International Journal of Law, Policy and the Family* 206; Rae Kaspiew and Lixia Qu, "Property Division after Separation: Recent Research Evidence" (2016) 30 *Australian Journal of Family Law* 1; Helen Rhoades, "Equality, Needs and Bad Behaviour: The 'Other' Decision-Making Approaches in Australian Matrimonial Property Cases" (2005) 19 *International Journal of Law, Policy and the Family* 194; Lixia Qu et al, "Post-separation Parenting, Property and Relationship Dynamics after Five Years", *Report* (Attorney-General's Department, 2014).

[131] Rawls, above n 9, 472-473; citing Victor Fuchs, *Women's Quest for Economic Equality* (Harvard University Press, 1988); See also John Rawls, *Justice as Fairness: A Restatement* (Belknap Press, 2001) 167.

[132] Rawls, above n 9, 474.

directly addresses the issue. In its purest (and earliest) form, Rawls adopts a division of an equal division of matrimonial property, with an unequal division based on a disparity in earning capacity.

## VI RAWLS AND THE PRIVATE SPHERE

Rawls described the right to equal rights and liberties as having priority over all others.[133] Liberal feminists raise the issue, in light of priority to liberty, whether the theory is sound within the context of the private sphere. The gravamen of liberal feminist critiques of Rawls seems to be that the theory either fails to address the distinction between the private and the public, or, more fundamentally, prioritises the public over the private. For example, Okin, who described herself as a defender of Rawls' version of liberalism,[134] wrote that Rawls paid little or no attention to the internal justice (or injustices) of the family.[135] She argued that there was an implicit reliance by Rawls on the distinction between the public and the private.[136] She wrote that the effect of such a distinction was to assume that rational economic behaviour was the natural preserve of men to the relegation or exclusion of the influence of women.[137]

Rawls directly addressed the public/private distinction in *Justice as Fairness: A Restatement*, where he wrote that, in effect, that the principles of justice themselves determine whether they ought to apply at a constitutional, legislative, or some other level. Rawls wrote (after much of the critique mentioned above), '[i]f the so-called private sphere is exempt from justice, then there is no such thing.'[138] However, shortly preceding this statement (as it appears in *Justice as Fairness: A Restatement*), Rawls wrote that 'we wouldn't want political principles of justice to apply to the internal life of the family.'[139] These positions are reconcilable if once accepts that when Rawls refers to political principles, he means the first principle of justice, not the difference principle. If this argument fails, then a proper concession is the existence of some disquiet, or ambiguity, by Rawls in the broad application of his theory within the family.

Okin considered that Rawls' revised position was a significant application of his theory of justice to gender equality.[140] However, she expressed reservations about whether Rawls was genuinely committed to justice within the family.[141] She asked why the difference principle could not apply to the family.[142] Okin's critique sharply illuminates some inconsistencies in Rawls' work. Initially, Rawls acknowledged a practice of sharing half of the gain of family wealth, with particular reference to retention by the husband of his [sic] earning capacity. Later, Rawls stated that the private sphere could not be exempt from justice. Rawls did not expressly

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[133] Rawls, above n 10, 38.
[134] Susan Moller Okin, 'Equal Citizenship, Gender Justice and Gender: An Unfinished Debate' (2004) 72 *Fordham Law Review* 1537, 1546.
[135] Susan Moller Okin, 'Justice and Gender' (1987) 16(1) *Philosophy and Public Affairs* 42, 48.
[136] Okin, above n 132, 1552.
[137] Ibid 1552, citing Frances Olsen, 'The Myth of State Intervention in the Family' (1985) 18 (4) *University of Michigan Law Reform Journal* 835.
[138] John Rawls, *Justice as Fairness: A Restatement* (Belknap Press, 2001) 167.
[139] Ibid.
[140] Susan Moller Okin, ''Forty Acres and a Mule' for Women: Rawls and Feminism' (2005) 4(2) *Politics, Philosophy & Economics* 233, 245.
[141] Ibid.
[142] Ibid 246; See also Susan Moller Okin, *Justice, Gender and the Family* (Basic Books, 1989); Linda McClain, 'Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations' (2004) 72 *Fordham Law Review* 1569.

state that the difference principle should apply within the family. He did not resolve what would happen if there were a conflict between the difference principle in the private sphere and fundamental rights or liberties. What appears un-contestable is that Rawls directly addresses the financial circumstances of marriage breakdown. On the question of whether Rawls' comments on the family are central or merely ancillary to the central tenants of his theory, there are two possible answers. At the outset, Rawls defines major institutions to be subject to the principles of justice. Included in those major institutions was the monogamous family.[143]

Given the prominence of the (monogamous) family as a major social institution, it follows that Rawls at least contemplated the role of families in society and his comments on the family were not a mere afterthought. However, should the reader not accept this answer then the second possibility is this article's alternative law must – by extension – take, adopt and apply one strand of liberal feminist critique. The result is that Rawls' theory of justice, in particular, the difference principle, is applied to the private sphere, irrespective of the competing views concerning the theory's original purpose.

## VII NECESSARY PRE-CONDITIONS

The difficulty is determining at what point the law should determine that spouses should share equally in all of their property. The alternative law presented here expressly rules out using the status of the relationship independently. Existing international provisions confine themselves to sharing of the net matrimonial property equally, or unequally (for example) as (in Scotland) justified by 'special circumstances.'[144] British Columbia and Ontario legislation provide that each of the spouses have a right to an equal division of all family property.[145] However, Ontario defines net family property as property after deducting the value of the property, other than a matrimonial home, that a spouse owned at the date of marriage.[146] British Columbia excludes from family property any property acquired before the relationship, inheritances, gifts, damages awards, and specific categories of discretionary trusts.[147]

There is no known present example where there is a rule of equal division that does not exclude specific categories of property. However, the Law Commission New Zealand in its preferred approach paper proposes a model, a modified version of which provides a useful template for a set of pre-conditions for equal sharing. The New Zealand preferred approach is that there be a sharing of income, described as a FISA ('Family Income Sharing Arrangement').[148] Without examining the whole merits of that proposal, it does prescribe a set of pre-conditions before it applies. They are:

a. The partners have a child together; or
b. The relationship was ten years or longer; or
c. During the relationship:
    a. Partner A stopped, reduced or did not ever undertake paid work, took a lesser paying job or declined a promotion or other career advancement opportunity, in order to make contributions to the relationship; or

[143] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 7.
[144] *Family Law (Scotland) Act 1985* (Scot) c 37 s 10.
[145] *Family Law Act*, SBC 2011, c 25, s 81; *Family Law Act*, RSO 1990, c F.3, s 5(1).
[146] *Family Law Act*, RSO 1990, c F.3, s 4(1) (definition 'net family property').
[147] *Family Law Act*, SBC 2011, c 25, s 85(1).
[148] Law Commission New Zealand, above n 6, 110.

b. Partner B was enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions of Partner A to the relationship.[149]

Taking the New Zealand pre-conditions to income sharing, and combining it with the Rawlsian concept of equality argued here, draws the necessary Rawlsian pre-conditions. The pre-condition approach works by amending the *Act* to include a separate cause of action. The cause of auction requires some form of labelling. This article adopts the term 'substantial sharing order.' A spouse is entitled to a substantial sharing order if that spouse:

a. Had a child or children with their partner, or had primary or substantial care of a child of one of the partners, *and*
b. The relationship was ten years or longer (measured from the date the relationship assumes the character of a de-facto relationship, to the date of breakdown (irrespective of the date of any marriage), *and*
c. The parties have not entered into a financial agreement which is binding, *and,*
d. One partner stopped, reduced, or did not ever undertake paid work, took a lesser paying job or declined a promotion or other career advancement opportunity, to take responsibility for, or applied that partner's time towards, care of children.

A substantial sharing order is either (a) an equal division of property or (b) an unequal division of property by the cause of action. Such a cause of action sets out a statutory entitlement to equality (as a base point), but also leaves no doubt about the reasons for such a benefit. To ensure the structure of the reasoning process (but to avoid 'steps' terminology from previous cases), this is labelled 'Phase 1: The Threshold Finding'. This phase also provides that, on the meeting of entitlement requirements, a court must decide the application by the cause of action using 'Phases' in sequence. Without the entitlement threshold, section 79 of the *Act* applies.

The threshold applies Rawlsian theory and addresses the shortcomings of the existing section 79 of the *Act* in three ways. First, it sets out a clear theoretical basis for entitlement. Second, the law is clear and known. Third, it forms a basis for judicial decision making to be impartial and seen to be impartial.

## VIII RECOGNITION OF NON-DISCRIMINATION

The model now moves to incorporate the absence of discrimination. The principle, in part, draws directly from Rawls' statement accepting as a value the freedom and equality of women.[150] If equality is fundamental to the terms of the association between the spouses, and the family meets the type of pre-conditions, then there appears to be little rationale to exclude specific categories of property. The desire to eliminate particular kinds of property, such as wealth brought into the marriage, gifts and inheritances and personal injury claims proceeds appears to reflect a notion that the other spouse did not 'earn' the property and is therefore not entitled to it. The result is the preservation of interests of spouses in law or equity, which is at odds with the existence of legislation to alter property.

'Phase 2: The Equal Entitlement Finding' is, therefore, defining property and dividing it in half by value. It is quite deliberately a finding, not an order. A person is entitled to an equal

[149] Ibid.
[150] Rawls, above n 8, 474.

entitlement finding based on the value of the property. The property consists of any property owned by the parents jointly, or separately, obtained before, during or after the marriage, in law or equity, (including superannuation) by any means, at its value at the date of hearing.[151] Subject to that condition, property need not change its meaning (nor should liabilities) from the existing approach in section 79 of the *Act*. Then, again drawn from New Zealand (with modifications)[152] the next provision is that each partner is 'entitled to share equally by value in all net property'. The result is a quantum for each spouse. If the spouses wish to stop at this point and not seek an unequal division, then the only argument remaining is the composition of the property to be retained by each party, subject to a separate discretion (discussed below).

## IX UNEQUAL DIVISION: APPLYING THE RULE OF LAW

'Phase 3: Unequal Division Process' is a judicial discretion to divide property but sets out the method and confines of this process. If judicial discretion is going to remain, then, to meet the Rawlsian justice criteria, the rule of law must be met, as it forms part of Rawls' fundamental rights and liberties, which have priority.[153] A full discussion of the rule of law is beyond this article's scope. This discussion restricts its focus to the precepts 'that similar cases be treated similarly',[154] and that laws be known and expressly promulgated.[155] The literature supports these elements as part of the rule of law. Some describe the rule of law as requiring a law to be 'prospective, open, clear and stable.'[156] Others include the proposition that similar cases should have the same treatment, but also 'different cases should be treated differently.'[157]

Discussion on the rule of law need not descend into a binary argument between absolute rules and absolute discretion. The literature points to the benefits in the retention of forms of judicial discretion, but with express statements of the values underpinning principles, and careful management of the reasoning process. Culp-Davis, in his seminal work, warned of the dangers inherent in unfettered discretion, but also considered that a progression from unstructured discretion to a structured one was appropriate 'when private interests are at stake and when the same issues often recur.'[158] Sunstein argued that mandatory guidelines might establish standards monitoring discretion, but that this very flexibility may not be a virtue. [159] Schneider wrote that the leading benefit of judicial discretion was that it gives a judge authority 'to do justice in each individual case.'[160] He argued that such discretion was tolerable provided a judge

[151] *Omanici & Omanici* (2005) FLC ¶93-218.
[152] *Property (Relationships) Act 1976* (NZ) s 11.
[153] Rawls, above n 10, 37-38.
[154] Brian Barry *The Liberal Theory of Justice: A Critical examination of the Principal Doctrine in 'A Theory of Justice' By John Rawls* (Oxford University Press, 1973) 35, quoting John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 237-238.
[155] Ibid.
[156] Cameron Stewart, 'The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law' (2004) 4 *Macquarie Law Journal* 135, 137; See also Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195, 199-200.
[157] Ibid 137; See generally Murray Gleeson, 'Outcome, Process and the Rule of Law' (2006) 65 (3) *Australian Journal of Public Administration* 5.
[158] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969 (ebook)) loc 1891.
[159] Cass Sunstein, 'Problems with Rules' (1995) 83 *California Law Review* 953, 966.
[160] Carl Scheider, 'The Tension Between Rules and Discretion in Family Law: A Report and Reflections' (1993-1994) 27 *Family Law Quarterly* 229, 234; See generally Emily Jackson, Fran Wasoff, Mavis MacLean and Rebecca Emerson Dobash, 'Financial Support on Divorce: The Right Mixture of Rules and Discretion?' (1993) 7 *International Journal of Law, Policy and the Family* 230.

was subject to a range of constraints, particularly procedural rules.[161] Ingleby, in a strong critique of discretionary justice, wrote that its only advantage was the possibility of doing justice in cases that were judicially determined.[162] He considered that, in effect, parliament had devolved the decision on the importance of contributions not only to judges but also to divorcing parties and their legal representatives.[163] Dewar argued in favour of wide judicial discretion for the minority of cases that are judicially determined, but that a rule-like framework should apply to parties undertaking negotiation.[164] He adopted Sunstein's term of 'acoustic separation' for this distinction.[165] The Full Court recently discussed applying the consistency test from criminal sentencing discretion to cases under section 79 of the *Act*.[166] The present position appears to be from the majority of the High Court in *Barbaro v The Queen,*[167] who wrote that consistency 'is in the application of relevant legal principles, not numerical equivalence.'[168]

The difficulty in leaving discretion unmanaged is that it replicates, albeit in a lesser form, all of the problems identified with section 79's unpredictability and uncertainty. One option to manage the quantum of judicial discretion comes from Henaghan, who wrote of a limitation on judicial discretion with a maximum of 15 per cent deviation from an equal division: a 65 per cent/35 per cent result.[169] He argued that this provided a means for parties to plan and understand defined expectations.[170] In providing limitations to the percentage division, Henaghan's proposal is far more consistent with the rule of law. However, a concern is that the cap of a 65 per cent assumes that this result will be sufficient to do justice in all cases, especially if there is only modest property.

One solution is a staggered cap to the adjustment. In the usual case, the maximum result could well be a 65 per cent/35 per cent division. However, the maximum adjustment could be 30 per cent (80 per cent/20 per cent division) when the value of the property is at or less 150 per cent of (say) the maximum allowable net property for a full pension, or a percentage of mean average household wealth. For families that fall under that mean, no maximum amount applies. In all cases, if an application for an unequal division applies, then the successful applicant is entitled to not less than 60 per cent of the net property. Percentage caps gives negotiating parties a framework (in the way Heneghan suggests) but adjusting for wealth gives better effect to Rawls difference principle

'Phase 3', while retaining judicial discretion, places quantum boundaries around it. In most cases, the range for the successful applicant will be from 60 per cent – 80 per cent of the net property. The range bookends the discretion and provides some greater predictability. However, by increasing the scope of judicial discretion for persons of lesser wealth, 'Phase 3' both treats different cases differently, meeting the rule of law, and accounts for disadvantage,

[161] Ibid 243.
[162] Richard Ingleby 'Australian Matrimonial Property Law: The rise and Fall of Discretion' in Manfred Ellinghaus, Adrian Brabrook and AJ Duggan (eds), *The Emergence of Australian Law* (Melbourne University Press, 1993) 177.
[163] Ibid 178.
[164] John Dewar, 'Reducing Discretion in Family Law' (1997) 11 *Australian Journal of Family Law* 309, 322.
[165] Ibid, citing Cass Sunstein, 'Problems with Rules' (1995) 83 *California Law Review* 953, 1007.
[166] *Wallis & Manning* [2017] FamCAFC 149 (10 February 2017) [42]-[58].
[167] *Barbaro v The Queen; Zirilli v The Queen* (2014) 253 CLR 58.
[168] Ibid [40].
[169] Mark Henaghan, 'Dealing to Disparity' (2008) 6 *New Zealand Family Law Journal* 51, 52.
[170] Ibid.

reflecting the difference principle. The 'one-size-fits-all' discretion in section 79 of the *Act*, and its inability to expressly provide greater adjustments for the least well-off is eliminated. Accordingly, at the end of 'Phase 3', a judge will have determined that *in the event* the court makes an unequal division, then the quantum of the adjustment will be within a certain range.

'Phase 4: Unequal division finding' then manages the factors guiding judicial discretion. There are two parts. First is a set out of objects and principles (addressing the absence of such objects in section 79 of the *Act*). Second is a specified set out factors to give weight to (expressed in mandatory terms to avoid the ambiguity about consideration of factors that section 79(4) of the *Act* has. In an unequal division finding, a court must find both the determined percentage division between the parties (within the specified range) and express that finding in dollar terms.

Objects and principles for an unequal division come from the New Zealand model drafting but then adapted to this article's model. They are:

a. The continuation of equality of spouses for the longest duration possible;
b. Priority to economic interests of children, to ensure children reach their full potential;
c. Recognition of the disparity of earning capacity between spouses;
d. Where there is more modest property to divide, the adjustment to the disadvantaged spouse ought to be greater, and
e. Consistency in the application of relevant legal principles, not numerical equivalence.
f. A duty to end the mutual ownership of the property to the greatest extent practicable.

Following the statements of principle are relevant factors. If a court finds that none of these factors exists, then the court must dismiss the application. However, if any one of the following factors exists a court must make an unequal division finding, and in doing so, a court must then give weight to:

a. The extent of disparity of earning capacity between the parties;
b. Whether the child support paid or payable meets the actual costs of dependent children;
c. Promoting the ability of a parent to assume, or continue, primary care of a dependent child or children if that parent chooses to do so;
d. Maximising the standard of dependent children's health care, education, and accommodation, in each of the parent's households; and
e. The objects and principles mentioned above.

'Phase 4: unequal division finding' establishes the final dollar entitlement, but, as yet, there is no consideration of the form of the final order. The benefits of 'Phase 4' are that it applies the core of the difference principle covering 'the costs of training and education and for using their endowments in ways that help the less fortunate as well',[171] together with the maximum benefit to the most disadvantaged.[172] Rawls statement that children ought to have the best opportunity to become equal future citizens provides an unambiguous basis for an unequal distribution of property when children remain dependent.[173] The direction to give weight and the limited factors address the weight issue in section 79(4) of the *Act* and permit a more significant opportunity for judicial consistency.

Provisions must avoid the ambiguity in other jurisdictions. One duty in the United Kingdom legislation is to consider 'the welfare while a minor of any child of the family who has not

[171] Rawls, *A Theory of Justice Revised Edition* (Harvard University Press 1999) 87.
[172] Ibid 72.
[173] Rawls, above n 9, 474.

attained the age of eighteen'.[174] There is no definition of welfare, although English parenting legislation defines welfare as taking into account emotional needs, the effect of any change in circumstances, and personal characteristics.[175] The New Zealand legislation provides that a court shall have regard to the interests of children of the relationship in any proceedings.[176] None of these provisions appears to direct a court on how to exercise discretion any differently when there are children. Literature suggests the existing provisions are of little practical use. Miles (in the United Kingdom context) argued that little priority was (in practice) given to the interests of children.[177] Peart argued that in New Zealand, children's interests play only a minor role in financial matters and were subservient to the main purposes of the legislation in dividing relationship property equally.[178] Parkinson's proposal to give effect to the accommodation needs of children does no more than the equivalent provisions in the United Kingdom and New Zealand. [179] It makes a statement of priority to the financial interests of children but provides no specific guidance on how a judge should meet that goal. If Miles and Peart are correct in their respective analyses, then statements of principle in legislation are not effective. An alternative law, therefore, needs specific direction on how to give weight to the actual costs of children's accommodation, education, and health.

## X COMPOSITION OF THE ORDER: EXPRESS PRIORITY TO CHILDREN'S INTERESTS

Separating the relevant factors for the quantum of the order from composition improves transparency. If, for example, spouses seek an equal division but remain in dispute about what property each is to retain, then the disagreement is narrower. Existing factors from cases under section 79 of the *Act* readily lend themselves to inclusion in a separate statutory discretion. Factors include the nature of the property (for example, whether superannuation, or business interest), a party's desire to retain specific property, the intrinsic value in keeping a home because of the proximity to favoured schools, [180] and the emotional effect on a person of having to sell their home.[181] If, however, the discretion on the composition of the order is to be as transparent as that for quantum, then objects and principles, together with weight, require expression. The result is removing the uncertainty. Once again, priority is to the economic interests of children.

On that basis, 'Phase 5: Terms of the Order' has both objects and principles, together with factors. However, to ensure that this discretion does not befall section 79's unpredictability, the terms of the order must reflect (to the greatest extent possible) the unequal division finding in dollar terms. The objects include:

a. Attempting, wherever possible, to ensure the children remain in the family home, or a home geographically close to the family home.
b. Avoiding, wherever possible, a change in the children's school, sporting, social, and extra-curricular activities.

[174] *Matrimonial Causes Act 1973* (UK) c 18, s 25(1).
[175] *Children Act 1989* (UK) c 41, s 3(a)-(g).
[176] *Property (Relationships) Act 1976* (NZ) s 26(1).
[177] Joanna Miles, 'Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and other Jurisdictions' (2005) (19) *International Journal of Law, Policy and the Family* 242, 253.
[178] Nicola Peart, 'Protecting Children's Interests in Relationship Property Proceedings' (2013) 13(1) *Otago Law Review* 27, 55.
[179] Patrick Parkinson, 'Reforming the Law of Family Property' (1999) 13 *Australian Journal of Family Law* 117.
[180] See, for eg, *Phillips & Phillips* (2002) FLC ¶93-104, 88-986; *Myerthall & Myerthall* (1977) FLC ¶90-273.
[181] *Stanford & Stanford* (2011) FLC ¶93-483; 85-990.

The factors to give weight to then are:

a. The cost of housing in the area of the family home;
b. The nature of other property of the parties, whether superannuation, real estate, businesses or otherwise,
c. The taxation or other financial consequences of selling property;
d. Priority to children's stability over retention of income-producing assets;
e. The borrowing capacity of either spouse to make a cash payment to the other, while still retaining the home or a home;
f. The emotional impact on the children of selling the family home;
g. The travel time and costs of the children's existing school and extra-curricular and social activities and how this would change with moving house;
h. Any parenting arrangements or orders;
i. The age of the parties, in particular, whether any superannuation interest is likely to vest in the next five years; and
j. The objects and principles of this phase.

Unlike international provisions and section 79 of the *Act*, this requires a court to express very clearly framing reasons for the orders and continues to give practical priority to the interests of children. Such provisions have the dual benefit of meeting the Rawlsian criteria for children, and expressing factors lacking in section 79 of the *Act* about how the order should be composed. They avoid the pitfalls of international legislative provisions giving only vague priority to children's interests. This final phase provides continued management to judicial discretion in a way section 79 of the *Act* does not.

## XI CONCLUSIONS

Taking Rawls' theory of justice and applying it to family relationship property delivers values for a just outcome. A just law is one which (while retaining some form of judicial discretion) meets the rule of law, offers equality between spouses, adjusts for differentials in earning capacity and financial circumstances, and prioritises the economic and personal interests of dependent children.

This concept of a model Rawlsian law results in significant wealth transfers to those spouses who have previously, or presently, have primary care of children, irrespective of gender. The model sets out sequential steps for determining applications and provides caps to the division of property. The stability of the reasoning framework facilitates greater negotiation between spouses. It implements a principle of non-discrimination between spouses in separated families by identifying their property (including superannuation) and dividing it equally, irrespective of the circumstances of acquisition, maintenance, or improvement of that property. It recognises financial disadvantage by increasing the unequal division of property when there is less property to divide. It provides a specific mechanism to implement priority to the financial interests of children, rather than just a statement of principle.

It is transparent by separating the discretion for the composition of the order from the amount each spouse receives. Implementation requires significant and ongoing public education about the availability of financial agreements, the desirability of spouses reaching agreement about their finances, and the economic consequences that follow on failure to reach an agreement.

The model does not interfere with the liberty of parties to interfere in a financial agreement, nor does it eliminate applications for spousal maintenance. It sits within the existing structure

of the *Act*. This model is not, and does not seek to be, of broad appeal for all types of spousal relationships. It is a partial solution to the issues facing specific kinds of families. For those families that do not fall within the framework the present system may be the least-worst fall-back. However, the proposed model at least provides a scheme expressly drawn from an express theoretical foundation. Whatever the final form of a new family property settlement law is to be, it should rest on a transparent policy foundation readily accessible to all stakeholders in the family law system. This model provides one way of achieving that end.