

AUSTRALIAN INSTITUTE OF FAMILY STUDIES CONFERENCE

THE FAMILY HOME IN AUSTRALIAN LAW

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1. OVERVIEW AND INTRODUCTION

In some overseas jurisdictions the matrimonial home is given special protection in two specific situations:

- * against the claims of creditors, both secured and unsecured
- * in the event of separation and/or breakdown of marriage.

This paper will demonstrate that in Australia, the matrimonial home receives no such special protection in either of these two contexts. This results quite frequently in entire families being displaced with repercussions not only for the family, but for society as a whole. Some of these repercussions will be explored.

The case for extending to the matrimonial home special protection will be advanced and explored. This will take place from the perspective of spouses and/or children who will be displaced if no special protection is granted. Children are generally innocent victims if they are displaced from the matrimonial home. The situation of a displaced spouse is somewhat more complex, however. In relation to the claims of creditors to the matrimonial home, one spouse may be neither borrower nor mortgagor, and the exposure of the home may be attributable exclusively to the acts or omissions of the other spouse. To describe the former spouse as 'innocent', however, is both problematic and simplistic. It could be argued that even the 'innocent' non-borrower, non-mortgagor spouse may have enjoyed the direct or indirect benefits of actions by the other spouse which led to the home being exposed to the claims of creditors. This paper will argue that even in these situations, the focus should be on the needs of both spouses and children, rather than on issues of benefits derived, culpability or conduct.

There is a gender issue here which needs to be confronted at the outset. Whilst the use of the term 'spouse' may well be a politically correct non-specific gender-neutral term, it both belittles the plight of, and obfuscates the reality that it is wives and mothers who are most affected by the issues discussed in this paper. No statistics will be advanced to support this contention. It is based on the writer's own experience of nearly twenty (20) years in legal practice, mostly in family law. Women seem to be predominantly the owners or a co-owner, third party mortgagors, co-debtors, or non-debtors, who are displaced when the matrimonial home is sold either to meet the claims of creditors, or to meet the claims of the other spouse under the *Family Law Act 1975 (Cth)* (called 'FLA'). It will be seen that several eminent Australian academics, judges and practitioners share the writer's view that the law in the present context is gender based, in practice if not in theory.

It will be seen that a difficult balancing exercise needs to be undertaken as between the conflicting rights and interests of spouses and children on the one hand, and creditors on the other hand, in relation to the matrimonial home. This paper will establish, however, that the rights of creditors are not only well-defined in this context, but are presently superior to those of wives and children. There is no case for augmenting creditors' rights - precisely the opposite is argued in this paper. A balancing exercise also needs to be undertaken as between the needs and rights of the occupant and non-occupant spouse.

A distinction is drawn in this paper between family law and civil law. The former

will explore the treatment extended to the matrimonial home under the FLA. The use of the term "civil law" does not mean civil law in the continental sense. Rather the term explores the position of the home in other general areas of Australian law with a particular emphasis on law governing the relationship between debtors and creditors including bankruptcy. It will be seen that in so far as both family and civil law deal with the home, they not only overlap but are inconsistent in their approaches and outcomes. This paper will not consider the position of spouses outside the FLA, except to briefly explore the discriminatory impacts of existing law. Thus this paper does not contain any detailed examination of de facto relationships law, the law governing same sex couples, and the law governing other relationships. This omission should not minimise the importance or prevalence of such relationships, or in any way belittle the impacts in these relationships of the problems explored in this paper. The explanation is simply this - it is the pragmatic response to the tyranny of the word limit. Nonetheless, many of the conclusions reached in this paper will be of much broader application and will certainly apply in the context of non-marriage relationships. The discussion of impacts on children will also be of general application.

The remedies available to protect the home under family law will be explored, evaluated and then briefly compared and contrasted to the law in some overseas jurisdictions. One particular remedy will receive more detailed consideration - the deferred sale of the home - in the context of both family and civil law. It will be argued that this is a useful but under-utilised remedy which can be fashioned to do justice and equity as between spouses, children and creditors.

At several points throughout this paper there will be reference to a survey (called the Survey) which was conducted in May/June, 1999 for the purposes of this paper. The Survey explores the attitudes and practices of experienced family lawyers in relation to the matrimonial home, and specifically the remedy of the deferred sale of the home. The Survey was sent to all 250 specialist family lawyers accredited by the Law Society of New South Wales. One hundred and twenty five (125) responses were received. The cohort surveyed was, a very experienced group of family lawyers dealing with a large number of current files.

Finally, this paper will conclude with some reflection on where the law is today, and a consideration of possible reform.

2. **THE FAMILY HOME: THE CASE FOR SPECIAL TREATMENT**

Introduction

- 2.1 A central hypothesis of this paper is that the family home deserves to receive special treatment, or special significance, in the eyes and at the hands of the Australian legal system in two specific contexts - in claims by creditors or the trustee in bankruptcy, and when assets are divided on the breakdown of marriage. It could be argued that the importance of the home, indeed its centrality to society, is axiomatic, but in this section some arguments for special treatment will be elucidated and examined. The arguments do not necessarily apply in both of the contexts referred to above.

At the outset the writer wishes to acknowledge first that it was felt that this hypothesis would not be one shared by a majority of practising family lawyers and second that the issue of special treatment of the home is one which had received prior academic attention. The Survey confirmed the writer's first perception as 56% of respondents believed that the family home should be treated just like any other asset, and only 39% believed it should receive special consideration. That the central hypothesis of this paper advances a view of the family home which is not shared by the majority of family law specialists in no way deters or detracts from the argument of the hypothesis. In relation to the second perception, this paper will refer to a not inconsiderable volume of literature which deals in some form, directly or indirectly, with the central hypothesis of this paper. Nonetheless it is submitted quite confidently that this paper presents the arguments in favour of the hypothesis uniquely, from an Australian perspective, and more comprehensively than any other source.

Family Home as a Place of Shelter

- 2.2 The argument that the family home is a place of shelter, and as such is deserving of special protection, can be expressed in many different ways. Kovacs¹ cites the Report of the Ontario Law Reform Commission²

...the matrimonial home must be made the subject of separate treatment corresponding to its special significance as a major asset, a basic family shelter, and a focal point for family activity and as such requires occupational rights in it to be secured....

The question needs to be asked: shelter to whom? The family home is shelter to and for the family. The family home has a symbolism connected to the importance of the family in society itself. Indeed, as one New Zealand writer³ has expressed it the family home has become an extension of the personality of the family unit itself.

The family home is not just a place of physical shelter and security, but emotional shelter and security as well, for the family and its constituent members. To the extent to which the family home contributes to the security which individuals seek in forming families, the law should contribute to and enhance that. The law should encourage family stability. The FLA overtly states this in s43(b):

43. *The court shall, in the exercise of its jurisdiction under this Act...have regard to -*

¹ Kovacs, "Matrimonial Property Law Reform in Australia: The Home and Chattels Expedient. Studies in the Art of Compromise" (1978-1980) University of Tasmania Law Review 227 at 233-4.

² Ontario Law Reform Commission, *Report on Family Law Part IV Family Property Law 1974-1975* at 53.

³ Withnall, "Negligence and the House that Jack Built" (1990) 7(2) Otago Law Review 189.

- (b) *The need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children.*

Thus, to the extent that the law protects and preserves that which shelters and nurtures the family unit, it is promoting social stability. Conversely, it could be argued to the extent that the law fails to do so, it may inadvertently and by omission, destabilise the family in its broadest sense, howsoever constituted⁴.

Watson⁵ puts it quite simply and bluntly:

...it [referring to the home] also quite simply satisfies an essential human need - that of shelter.

It must be acknowledged, however, that this argument is at least partially dependent on the family unit remaining intact. When the family no longer remains a unit in consequence of marriage breakdown, the justification based on shelter is still valid, but there are other reasons for giving special protection to the home which are explored below.

In the broader context, Kendig⁶ believes that the importance of housing extends well beyond the provision of shelter and has a large impact on economic wellbeing.

The shortage of adequate accommodation has been a persistent and difficult problem in the 20th century, certainly overseas, and to a lesser extent in Australia. The capacity for families to find satisfactory shelter is linked to economic factors (e.g. housing affordability, rental property availability, tax deductibility of rental property ownership, interest rates, the property market cycle) and policy issues (e.g. public and private housing funding and incentives, delineation of responsibility between federal, territorial and state governments). These factors and issues change from time to time. It is totally inappropriate to fail to confront some of the issues discussed in this paper simply because Australia currently enjoys strong economic growth, with housing affordability and availability of public and private rental accommodation at very high levels⁷. The current phenomena is ephemeral. The complexity of the issue of

⁴ See Eekelaar, *Family Security and Family Breakdown* (Penguin Books, Harmondsworth, 1971), at 76.

⁵ Watson, "Matrimonial Property Research Paper: Housing After Divorce" (1985) Australian Law Reform Commission 1.

⁶ Kendig, "Towards Developing Australian Housing Indicators" in *Family Wellbeing: Proceedings of a Workshop* (Melbourne, 3 June 1987, Australian Institute of Family Studies, Melbourne), at 1.

⁷ Percival (Percival "Changing Housing Expenditure, Tenure Trends and Household Incomes in Australia, 1975-76 to 1997" Discussion Paper No. 28 (March 1998) National Centre for Social

providing adequate shelter is exacerbated in federal systems such as Australia where policies, procedures and laws relating to the family home vary so greatly from state to state, and between the Commonwealth, states and territories. Watson refers not just to the substantial variations between housing policies between states but the spatial variations in house prices across Australia as well, making a consistent approach even more difficult⁸.

The complexity of some of the issues which surround the family home as being a place of shelter, thus deserving special legal treatment, evidences in the writer's opinion the importance of this discussion.

Family Home as the Cornerstone of Marriage

- 2.3 It is submitted that the home is the cornerstone of a marriage⁹. In this context, the family home should best be described as the matrimonial home. The argument that the family home is a place of shelter for the family needs to take into account that marriage is a specific legal institution. The FLA applies to marriage, but a combination of statute and common law applies to other relationships. So far as the family home is concerned, a tension is created by the different legal regimes which apply, so that there is not necessarily any consistency between the protection (if any) afforded to the matrimonial home under the FLA, and the family home in the broader context of the civil law.¹⁰

The argument for special treatment of the matrimonial home is based on the perceived importance of marriage in society. It could be argued that the treatment given to the matrimonial home in modern family law reflects the strength of conviction and commitment to marriage in society. A legal system which inadequately upholds and protects the matrimonial home, inadequately upholds and protects the institution of marriage. A comparative legal analysis of the place of the family and matrimonial

and Economic Modelling, Faculty of Management, University of Canberra) found that real housing costs rose for purchasers and private renters in the period 1975-76 to 1997, leading to a marked decline in the rate of home purchasing which was greatest among lower income households and single income families and which led to this group becoming increasingly renters. From 1998 however, housing affordability has been described as being "close to record levels" - Sydney Morning Herald, 8 January 1999 "Building Growth Grinding to a Halt" at 17. Housing affordability continues to be high despite soaring house prices - Sydney Morning Herald, 28 January 1999 "Cost of Sydney Housing is Nothing to Yours" at 6.

⁸ Watson, op cit n 5, at 1, 33-35. The spatial variations in house prices across Australia are also illustrated in "Australian Housing: The Demographic, Economic and Social Environment", The National Housing Strategy Issues Paper No.1 (Australian Government Publishing Service, Canberra, 1991), pp 43-46.

⁹ Australian Law Reform Commission, *Matrimonial Property: ALRC Report No.39* (AGPS, Canberra, 1987), at 125.

¹⁰ DeFacto relationships are covered in NSW by the *DeFacto Relationships Act 1984* (NSW) now called the *Property (Relationships) Act 1984* (NSW) and covering a broad range of relationships outside of marriage.

home in various overseas legal systems is not only instructive, but self-revealing in this regard. In jurisdictions such as New Zealand¹¹ and England¹², the matrimonial home holds a cherished place in the law, not only in division between spouses on separation, but as between spouses and third party creditors. In Ontario¹³ the importance of the family home in the context of marriage is clearly recognised. Thus, for example, in *Caines v Caines* Fleury J of the Ontario County Court examined certain sections of the Ontario *Family Law Reform Act* 1978 which deal with the family home. His Honour states¹⁴:

The cornerstone on which the Family Law Reform Act was constructed is the concept of marriage as a form of partnership: Family Law Reform Act, preamble. As a necessary consequence of this partnership the Act gives preferential treatment to the matrimonial home in case the partnership should break up. The matrimonial home is singled out for special treatment because, as the Ontario Law Reform Commission put it in its report:

"...there is no other major asset that is either so uniquely referable to the relation of husband and wife or which involves such exacting and prolonged demands for management of finances, mutual sacrifice and physical efforts towards a common goal, as does the matrimonial home": Report on Family Law (1974), Pt. IV - Family Property Law, p.134.

The formal absence of this special recognition in Australian family and civil law may indicate a different view of marriage generally. Despite the rhetoric of both the *Marriage Act* 1961 (Cth) and FLA that marriage is a union "for life", the reality, for a significant minority of the married population, is that marriage is a relationship-at-law which may be terminated on 12 months notice, and a personal/emotional relationship which may be terminated at will.¹⁵ But if this "disposable" view of marriage reflects reality, it is hardly surprising that Australian family and civil law may be found to be distinctively unenthusiastic about special protection to the matrimonial home, particularly compared to the overseas jurisdictions referred to above.

¹¹ Matrimonial Property Act 1976 (NZ) ss 26, 27, 28, 28A.

¹² Southwell "Divorce and the children: The Matrimonial Home and Maintenance" (1986) 130 Solicitors Journal 196.

¹³ Family Law Reform Act 1978 (Ont.) s45.

¹⁴ *Caines v Caines* (unreported, Ontario County Court, Ontario, Fleury J, 16 October 1984, at 2 found on LEXIS reported as (1984) O.J. No. 2219.

¹⁵ *In the Marriage of S* (1980) FLC 90-820 at 75177 Watson J referred to marriage as a relationship entered into "for an indefinite duration, hopefully for life." Mary Ann Glendon refers to the widespread expectation that marriage will only last only so long as it provides personal fulfilment. Glendon, "Is there a future for separate property?" (1974) 8 Family Law Quarterly 315 at 323. Glendon is cited in O'Donovan, *Sexual Divisions in Law* (Weidenfeld & Nicholson, London, 1985), p 113.

Nonetheless, the argument for special protection of the matrimonial home as the cornerstone of marriage is still a valid one. Marriage remains a permanent institution for the majority of Australian families.¹⁶ The matrimonial home is the place where the family as the most efficient unit in society, functions, grows, procreates and contributes to society as a whole. This is a significant social function. The argument must be carefully considered that the matrimonial home be protected so that the social unit founded on marriage can continue to contribute to the greater well-being of society in the most efficient and effective manner. Whilst the family is intact, this argument can be maintained with full force. Even when the family breaks down, however, as a result of marital breakdown, there is still merit in extending protection to the remnant of the marriage - the family - particularly if it includes children. This argument is explored and expanded below.

The Prevalence and Importance of Family Home Ownership

- 2.4 The sheer prevalence of home ownership in Australia is a compelling reason for giving protection to the home particularly in the context of creditors, but also on division as a result of family breakdown. McDonald states¹⁷:

The family home occupies a more central place in Australia than in most other matrimonial property jurisdictions. This is quite simply because of the very high rate of home ownership in Australia and because of the extent of conformity to 'the Australian dream' of owning a house on a one-quarter acre suburban block. For many Australians, the house is the cornerstone of personal security. Because of protections of the family home from tax and welfare intervention and because of the availability of special interest rates for home loans, the Australian dream is not merely an idealistic philosophy, it is sensible economic planning. Added to these conditions, inflation in property markets has meant that equity in the matrimonial home is likely to constitute a greater proportion of an Australian couple's net worth than would be the case in most other industrialised countries.

The explanations for high rates of home ownership in Australia are therefore subjective and objective, philosophic and economic. Watson¹⁸ explains that in 1981,

¹⁶ The Family Law Council reported that in 1997 the number of marriages celebrated in Australia was 106,735, an increase of 632 over the previous year. In 1997 there were 51,288 divorces, a decline of 1178 over the previous year. The crude divorce rate in Australia i.e. number of divorces per 1000 population declined from 2.9 in 1996 to 2.8 in 1997. *Family Law Council Annual Report 1997-98* (Australian Government Publishing Service, Canberra, 1998).

¹⁷ McDonald, P (Editor) *Settling Up - Property and Income Distribution on Divorce in Australia* (Australian Institute of Family Studies, Prentice Hall, Australia, 1986), (hereinafter referred to as 'McDonald') Ch 8 Housing, at 151.

¹⁸ Watson, op cit n 5, at 2-3.

68% of all Australian households either owned or were purchasing their dwellings. De Vaus and Wolcott¹⁹ found that in 1992 74% of Australian families owned or were purchasing the dwellings in which they lived and that in 1911 home ownership stood at 49.4%, by 1947 it was 52.6% and by 1966 it was 70.8%.

Burke Hancock and Newton²⁰ argue that the dominance in home ownership in Australia did not occur randomly, but reflected major policy commitments. Encouraging home ownership is a matter of both state and federal government policy with incentives, both historically and in the present, including First Home Owners Scheme, stamp duty rebates or deferrals, grants to low income first home buyers, housing loan interest rebates, Defence Service Home schemes, Home Fund and so forth.²¹ This has resulted, Watson mentions, in Australia having a comparatively small public housing sector, though this varies from state to state.

Winter also recognises the multiple advantages of home ownership to families, governments and society at large. Whilst the focus of his research was housing for older persons, some of his comments are quite apposite, particularly the governmental perspective²².

The importance of the family home is reflected in its favoured treatment by both Commonwealth and State taxation laws. It is exempt from Capital Gains Tax and NSW Land Tax²³ and now Goods and Services Tax in most situations.

One deleterious consequence of a high rate of home ownership is pointed out by Wulff²⁴. She refers to the division created within the Australian community and the economic gap between those who own homes, and those who do not.

¹⁹ De Vaus and Wolcott, *Australian Family Profiles: Social and Demographic Patterns* (AIFS, Melbourne, 1997), at 102-106.

²⁰ Burke, Hancock and Newton, *A Roof over their heads: Housing Issues and Families in Australia* (Institute of Family Studies, Monograph No. 4, Melbourne, 1984), at 1.

²¹ The same observations are made in "Australian Housing: The Demographic, Economic and Social Environment" The National Housing Strategy Issues Paper 1, op cit n 8, at 13-16.

²² Winter, "Home ownership and Social Policy in an Ageing Society" (Autumn 1999) No.52 Family Matters 9. Winter points out that the importance of the family home is also demonstrated by the fact that it is partially exempted from the age pension assets means test. This means that it does not make economic sense for families to sell their home and to reinvest in other assets as this would impact on pension entitlements. Combined with the absence of wealth or death taxes, this means that the family home is often passed on from generation to generation.

²³ With exceptions of course. *Income Tax Assessment Act 1997* (Cth) ss112-150; *Land Tax Management Act 1956* (NSW) s10(1).

²⁴ Wulff, "Divorce and the Family Home: Housing Problems and Policy Directions" (December 1988) AIFS Newsletter No.22 Family Matters at 36.

Wulff's concerns need to be remembered in the present context where the impact of failing to protect the family home, viewed in the broader context of other issues raised in this paper, may lead to unsatisfactory housing for families.

Australia is not the only country to have high rates of home ownership. In England, Ferris²⁵ refers to an owner-occupation rate of 66% in 1993, which increased from only 10% in 1914. He refers to one of the inevitable consequences of increased home ownership - significant increases in home lending and disputes between lenders and borrowers.

The argument for special legal treatment of the family home, or at the very least some regulation of how the family home is to be treated amidst the myriad social and legal problems which have arisen as a result of the prevalence in home ownership, starts to become apparent in view of the above.

Public Opinion and the Family Home

- 2.5 Another reason why the family home should receive special treatment in both the contexts examined is because that view seems to receive the support of public opinion based on studies conducted both in Australia and overseas referred to below. That there is this public opinion is by no means surprising when one has regard to the reasons why Australians enter home ownership. Winter²⁶ reports that the most prevalent reasons are based on financial security, stability, belonging and security.

In McDonald's study, "Settling Up" approximately 80% of respondents owned the matrimonial home at separation, and for most the home was the most significant asset. McDonald states²⁷:

"...we can presume that for many it had psychological importance, being the place where their children were raised and family life conducted."

In McDonald's study, the attitude of respondents in relation to the family home was tested by surveying attitudes to compulsory joint ownership of the matrimonial home. The majority of women (range 45% to 64% depending on the sample group) favoured compulsory joint ownership, and even a significant minority of men favoured it (range 40% to 37%). Furthermore, part of the Australian Law Reform Commission's report on Matrimonial Property²⁸ pointed to firm public opinion about ownership of the family home. From this it can be inferred that the family home is

²⁵ Ferris, "Case Commentary: Redefining Reasonable - Mrs. Morgan and her Mortgage." (1996) 8(4) Child and Family Law Quarterly at 351.

²⁶ Winter, op cit n 23, at 10-11.

²⁷ McDonald, op cit n 18, Ch 8 Housing, at 245-247.

²⁸ ALRC, *Matrimonial Property: ALRC Report No.39*, op cit n 9, para 211.

popularly perceived as having a special significance worthy of receiving special treatment.

Austin²⁹ may provide another explanation for why public opinion favours protection for the family home, and that is the link between housing and rights. She states:³⁰

...We must also recognise the worth of a home for the individual and the community. A home protects and supports a variety of rights in Australia which we often take for granted. There are definite and supportable links between housing and the enjoyment of:

- * *the rights to family life and privacy,*
- * *the right to be free from any form of discrimination,*
- * *the rights of the child,*
- * *the right to freedom of movement,*
- * *the right to be free from cruel, inhumane or degrading treatment,*
- * *the right to assembly and association,*
- * *the right to property and land,*
- * *the right to work,*
- * *the right to health,*
- * *the right to environmental hygiene/quality, and*
- * *the right to development.*

The Family Home as the most Significant Asset of the Family

- 2.6 The family home is the dominant asset in Australian family law and arguably in Australian society. For the vast majority of people, the family home is presently their most valuable asset, though with changes in superannuation policies and legislation, this may be changing. This is another reason for special treatment of the family home though, at the same time, it is also a reason why special treatment should not be given. McDonald³¹ concluded that where a couple has equity in a matrimonial home, that equity in most cases represents a very significant fraction of their total net wealth. The main statistical cluster was in the categories where housing equity represented between 40-80% of total wealth. In the 1990 study by Bordow and Harrison³² the value of the home accounted on average for some 85% of the value of the couple's

²⁹ Austin, *Rights for the Homeless* (Working Paper No. 5, Australian Housing and Urban Research Institute, Sydney, 1999).

³⁰ Ibid, at 3-4.

³¹ McDonald, op cit n 18, Ch 8 Housing, at 155.

³² Bordow and Harrison, "Outcomes of Matrimonial Property Litigation: An Analysis of Family Court Cases" (1994) *Australian Journal of Family Law* 264 at 269.

assets. This phenomenon is paralleled in both Ontario and England³³.

The Survey confirms the findings referred to above. The family law specialists were asked to indicate how often the family home was the most valuable asset in their matters. Twenty-nine percent (29%) responded that this was the case in over 90% of their files, and a total of 87% of respondents indicated that the family home was the most valuable asset in more than 70% of their matters.

The inevitable consequence of the family home being the most valuable asset is that it needs to be divided on separation between spouses. Even if there is no separation, it is the asset most frequently made available to creditors both secured and unsecured, in the latter case through bankruptcy. This in itself is reason for considering whether the home should be given special status. Indeed, perhaps the real issue is whether protection should be given in either or both of the contexts examined. Thus, whilst the marriage is intact the argument for protecting the home as the most valuable family asset against creditors may be more compelling than if the marriage has broken down. In the latter situation, it may be harder to justify one spouse being deprived of an interest in their most valuable asset. Balancing the competing interests of creditors and spouses is complex. Balancing the competing interests of separated spouses is perhaps even more complex.

The Family Home and Public Housing

- 2.7 Statistical data provided by the Australian Bureau of Statistics indicates that Commonwealth Government expenditure on public housing in 1996-97 was approximately \$1.4 billion, down from \$1.6 billion in 1994-5. The total estimated expenditure by the Commonwealth on rent assistance in 1997-8 was \$1.48 billion. As at March, 1998 there were about 910,560 recipients of rent assistance, 21% of which were lone parent families³⁴. In 1996-97 403,708 households (6% of all households) were living in public housing: of these, about 80% were in the lowest 40% of the household income distribution. Whilst 70% of the 6.9 million households in Australia in 1995-96 were home owners, 28% were renting with 21% of these renting from public housing authorities³⁵. The cost and preponderance of public housing in Australia is significant, and it is important to examine the same in both of the contexts examined in this paper.

In the family law context, Wulff³⁶ presents a disturbing picture of housing problems for female sole parents post divorce. She describes the process as "the tumbling out

³³ See Kovacs, op cit n 1, at 227.

³⁴ Source: *Australia Now - A Statistical Profile - Housing - Housing Assistance*, Commonwealth of Australia 1999 available through the Australian Bureau of Statistics Website: <http://www.abs.gov.au>

³⁵ Ibid, *Housing - Housing Ownership and Renting*.

³⁶ Wulff, op cit n 25, at 36-38.

of home ownership that accompanies divorce" and cites both McDonald's³⁷ study and data from a study of the Victorian Ministry of Housing and Construction Capital Indexed Loan Scheme (the Capil Project). She contends that for low income families the impact of marital separation:-

*...virtually meant the end of home ownership possibilities for these families, with only 6 percent of the women still in that housing sector. Use of the public and private rental sectors substantially increased, along with an upswing in the use of temporary accommodation.*³⁸

In the more general context, Winter and Stone³⁹ suggest that those households who enter the public rental sector seldom leave, and even 40% of tenants in the private sector have been there for more than ten years. The changes are long-term, if not permanent.

Watson⁴⁰ points out that not only are single parent families over-represented in public housing, but in the age group under 40, women out-represented men by up to 5 times to 1, thus reflecting women's lower incomes and consequent lack of alternatives in the private sector. De Vaus and Wolcott⁴¹ found that the "relatively high concentration of lone-parent families in public rental housing is striking, underlining the importance of this tenure category for particular family types."

Millbank⁴² notes the relationship between housing and poverty:

Housing and poverty are closely connected issues. Divorced men, even those with custody of dependent children, are more likely to become home owners, whereas divorced women are more likely to become public tenants if they have children, or private tenants if they do not. Both public and private rental bring their own set of impoverishing circumstances. Public housing is cheaper than private rental but entails long waiting lists and limited choice of location. Most public housing is also concentrated in areas where access to employment is difficult and unemployment levels, particularly among single parents are high.

³⁷ McDonald, op cit n 18, Ch 8 Housing.

³⁸ Wulff, op cit n 25, at 37.

³⁹ Winter and Stone, *Social Polarisation and Housing Careers: Exploring the Interrelationship of Labour and Housing Markets in Australia* (Working Paper No.13, AIFS, 13 March 1998), at 14.

⁴⁰ Watson, op cit n 5, at 13-14.

⁴¹ DeVaus and Wolcott, op cit n 20, at 102.

⁴² Millbank, "Hey Girls, Have we got a Super Deal for You: Reform of Superannuation and Matrimonial Property" (1993) 7 *Australian Journal of Family Law* 104.

Greater protection of the needs of women and children to remain in the family home after family breakdown may well reduce the adverse social impacts referred to herein.

But there is also an issue of reducing public expenditure on public housing, an issue which applies as much in the context of creditors as it does in the family law context. These public expenditure considerations have motivated at least in part, substantial legislative changes such as the child support scheme.⁴³ In any event Wulff⁴⁴ also refers to public renters having lower senses of financial security, lower children's and mother's housing satisfaction, and lower subjective well-being, compared to home owners. The social and financial impacts are significant and far reaching, and apply in both contexts examined in this paper.

The Family Home and Superannuation

- 2.8 Data supplied by the Australian Bureau of Statistics indicates that in 1995-96 the total value of all owner-occupied dwellings (including land) in Australia was estimated to be \$820 billion, of which owner-occupiers held \$690 billion in equity, or 84% of the value of owner-occupied dwelling stock. The value of dwellings and residential land represents 50% of the total value of assets occupied by the household sector. Equity in superannuation funds accounted for 17% of household assets⁴⁵. Superannuation is clearly a significant proportion of the personal wealth of all Australians, second in importance only to the family home.⁴⁶

There is an incongruous difference between the protection afforded under Australian law to superannuation, and the family home. This inconsistent approach is another reason for granting special protection for the family home.

The research of Bordow and Harrison⁴⁷ gives an interesting insight into the relevance

⁴³ Discussed using example of child support in Finlay, Bailey-Harris and Otlowski, *Family Law in Australia* (5th ed, Butterworths, Sydney, 1997) para 5.54. In December, 1987 the Minister for Social Security predicted that the Child Support Scheme would achieve a net saving of \$192.8M in 1989-90: House of Representatives Hansard, 9 December 1987, at 3137. In fact the expected savings were not realised, though significant savings were in fact achieved: Joint Select Committee on certain Family Law Issues, *Child Support Scheme. An examination of the operation and effectiveness of the scheme*, November 1994. (Commonwealth of Australia, Australian Government Publishing Service, 1994).

⁴⁴ Wulff, (1988) "Demographic change and housing policy: An analysis of a government home ownership scheme on female sole parents". Unpublished paper, cited in Wulff, op cit n 25, at 39.

⁴⁵ Source: *Australia Now - A Statistical Profile - Housing - Introduction at 1*. Commonwealth of Australia 1999 available through the Australian Bureau of Statistics Website, op cit n 36.

⁴⁶ Dewar, Sheehan and Hughes, *Superannuation and Divorce in Australia*, Australian Family Briefing No.6 of 1999 (Australian Institute of Family Studies, Melbourne), at 1.

⁴⁷ Bordow and Harrison, op cit n 33, at 269-270.

of superannuation in Australian families. Whilst superannuation is consistently the second most valuable asset acquired during marriage, yet it is disproportionately held by the husband far more often than the wife.⁴⁸ Both these facts cannot be ignored either in the present context, or in attempts by legislators to devise equitable methods for dealing with superannuation on family breakdown.

Whilst a consideration of proposals for reform are beyond the scope of this paper, the status quo is that superannuation is preserved and cannot be accessed until it has vested. In most cases therefore, it will remain where it is, and in whose name it is. Conversely, it is known that the matrimonial home is transferred to one party (frequency 55%) sold and divided (40%) or that sole occupancy is granted in only a few (5%) cases⁴⁹. There is, therefore, a glaring difference between the way superannuation and the family home is treated under the FLA, if it is considered at all, as recent research indicates that superannuation is only taken into account in 46% of cases⁵⁰.

In the civil law context, the protection given to superannuation, and the relative exposure of the family home, continues to be the case. Superannuation benefits are largely unassignable by the superannuant (even for the benefit of his or her spouse), and inaccessible except in the rarest of circumstances by the superannuant. For all practical purposes, creditors have no access to superannuation⁵¹. Conversely, however, creditors have access to the family home. The secured creditor has direct access to the home by virtue of its security instrument. The unsecured creditor has indirect access to the family home by way of judgement and/or bankruptcy.

In each of the situations referred to above, the family home is far more vulnerable to the claims of third parties than superannuation. There are policy reasons for protecting and preserving superannuation. The harsh economic and social fact which confronts Australia is that as a nation it cannot afford to publicly fund the retirement of a rapidly ageing population. It has been suggested that it is the agenda of the government to ensure that each person in Australia has their own superannuation scheme⁵². Those retirees must fund their own retirement, and Commonwealth

⁴⁸ This is confirmed by Dewar, Sheehan and Hughes op cit n 48. The study found (at 3) that superannuation entitlements are unevenly distributed: 76% men, 34% of women had superannuation on divorce. The median value of womens' superannuation at divorce was \$5,590.00 compared with \$26,152.00 for men.

⁴⁹ Bordow and Harrison, op cit n 33, at 272.

⁵⁰ Dewar, Sheehan and Hughes, op cit n 47, at 3.

⁵¹ See, for example, s116(2)(d) *Bankruptcy Act 1922* (Cth) discussed at 5.3 below. Some of the relevant superannuation legislation includes the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Retirement Savings Account Act 1997* (Cth). Vesting provisions are contained in Schedule 1 to the Regulations.

⁵² Submission from Women's Legal Service, Brisbane responding to *Superannuation and Family Law - A Position Paper of the Commonwealth* (Attorney General's Department, Commonwealth of Australia, 1998), at 2.

legislation since the 1980's commencing with the Occupational Standards Superannuation scheme, has provided not only incentives but compulsion for self-funded retirement⁵³. But is this pragmatic solution for a financially-challenged economy justification for, in effect, increasing the exposure of the family home to the claims of third parties, and also creating pressures between separating spouses which force a sale of the home in the face of compelling reasons not to do so? Is the family home to be sacrificed on the altar of economic pragmatism? Arguably, that is the impact of the current law. There has been scant regard to the policy reasons for in fact enhancing the protection of the home, some of which are considered in this paper.

This also suggests a clash or inconsistency in governmental policies. On the one hand home ownership is encouraged, but on the other hand ownership is not preserved when families break-up or creditors make claims. With superannuation, contribution is encouraged and retention and preservation compelled.

It is now appropriate to examine the interaction between the family home and superannuation in current family law. McDonald⁵⁴ found that the husband's superannuation was used by the wife as a lever towards obtaining a greater share of the family home for her. Furthermore, that increased share sometimes made it possible for the wife to actually retain the family home intact. This is consistent with the experience of women in the USA as Weitzman⁵⁵ points out in her study. The present situation, Millbank⁵⁶ correctly states, is that "women [have] a greater opportunity to retain the home due to the indivisibility of superannuation." All of this is consistent with the writer's own experience in legal practice and is a view supported by women's groups⁵⁷.

Proposals for Reform

A detailed consideration of the proposals for reform to superannuation are beyond the scope of this paper. What is significant in the present context is that where there is a family home, the court would be authorised to consider as part of the exercise of dividing the superannuation interests whether to do so would require that the family home be sold and whether this would cause serious disruption to care arrangements for the children of the parties and others for whom the parties have caring responsibilities, e.g. frail aged parents.

⁵³ See "Retirement Income Policy", Release 75: Treasurer Issued 15 August, 1989. This Press Release refers to the ageing of the Australian population, and the Commonwealth Government's strategy for retirement income.

⁵⁴ McDonald, op cit n 18, Ch 8 Housing, at 200.

⁵⁵ Weitzman, *The Divorce Revolution: The Unexpected Economic Consequences for Women and Children in America* (Free Press, New York 1985), at 79.

⁵⁶ Millbank, op cit n 43, at 117.

⁵⁷ For example, Submission by Womens Legal Service Brisbane to *Superannuation and Family Law - A Position Paper*, op cit n 53, at 2.

This is, arguably, one of the most significant developments in the jurisprudence of the family home to occur since the FLA came into effect in 1976. If the proposed legislation gives effect to the intent referred to above, the enquiry would be on whether the sale of the family home would cause serious disruption to care arrangements. The impact on occupants of loss of the family home will be considered below. It will be seen that the loss of the family home affects not just the legal or equitable owners, but the other occupants of the home particularly children.

If the proposed reforms are implemented in the manner in which they seem intended, Millbank's observation that women will have a greater opportunity to retain the home will not only remain true, but might be considerably enhanced. The reason for this is that adjustments made for superannuation have historically, in practice, been difficult ones to make. This was noted by Funder, Harrison and Weston⁵⁸.

In certain circumstances, therefore, women in particular will be able to trade off a share of her husband's superannuation entitlement against a greater share of the home. Notwithstanding this, the family home continues to be vulnerable to the claims of creditors, whereas the husband's superannuation remains impervious thereto. All of this will depend upon how the proposed legislation deals with the concept of "serious disruption to care arrangements", and how that will be interpreted by the judiciary⁵⁹.

Apart from these reforms, when and if they are implemented, and then depending on how they are interpreted and applied, Australian law creates an incongruous difference in the treatment and protection afforded to superannuation and the family home. That it is time to reconsider this is perhaps reflected in the government's proposals for reform, but they go some way only to give the family home the protection it needs, for the reasons set out in this paper.

The Family Home and Children

Introduction

- 2.9 It is well established that family breakdown affects the lives of many children. Funder⁶⁰ observes that divorce will end more than one in three marriages contracted in the 1980's, and will affect the lives of one in six children before they reach 18. Her research suggested that by the 1990's divorce would end one in three marriages within 30 years and involve one in five children during the years of their dependency. In 1974, 25505 children were affected by their parents divorcing in that year, in 1993

⁵⁸ Funder, Harrison and Weston, *Settling Down: Pathways of Parents after Divorce* (AIFS, Melbourne, 1993), at 196.

⁵⁹ The writer was not able to find any Australian case which considered the phrase "serious disruption". It is certainly a term used quite frequently in Australian cases - there were 51 matches on Austlii.

⁶⁰ Funder, *Remaking Families: Adaptation of Parents and Children to Divorce* (Australian Institute of Family Studies, 1996), at 13-15, 68.

that figure had increased to 48055. Funder observes that about 85% of children live with their mothers post separation, and nearly 80% of these families rely on social security at some time following separation.

Statistical information about children is also available as a result of Australian Law Reform Commission Report No. 84 "Seen and heard: priority for children in the legal process"⁶¹. It stated that in August, 1996, there were 4,836,227 children under the age of 18 in Australia, and it was estimated that this figure would rise to 5 million by 2025. Of the children aged 0 to 14 living in Australia, approximately 87% lived in the 1.7 million families that consisted of a couple with dependent children. One parent families made up 19% (467,200) of all families with dependent children in Australia in 1996. The Report noted that of these one-parent families 87% were headed by the mother and 13% by the father. Children in lone-mother families tended to be younger than in one-father families. McDonald stated that 1% of children could expect to have their parents divorce for each year of life i.e. about 5% of 5 year olds, 10% of 10 year olds and 15% of 15 year olds⁶².

Children suffer adverse consequences when they are forced to move out of the family home and these consequences will be explored below. The reason why they are forced to move does not matter as much as the adverse impacts on them of the move. There are two situations contemplated here as to why the children move. It may be referable to the breakdown of their parent's relationship or marriage. What the children experience in moving from the home is inextricably interwoven with the breakdown in the family. The reason for children moving may also be referable to the intervention of creditors. There may, or may not, in this context, be other family disharmony. If creditors have intervened to force a sale of the family home, there are high levels of stress within the family unit⁶³. The situation may have been created by the conduct of both or one parent and that conduct could be advertent or inadvertent.

Here however, the focus of the inquiry is on the impact of the children, irrespective of the reason for moving out of the family home.

Changes in Housing Post Separation

With this background, it is important to consider the housing situation of families prior to separation. McDonald⁶⁴ found in his study that 96% of respondents were

⁶¹ A joint report of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission (Australian Government Publishing Service, Canberra 1997)(called the ALRC - HREOC report"). The statistics cited above are found in Chapter 2 of the report.

⁶² McDonald, *Families in Australia: A Socio-demographic Perspective* (Australian Institute of Family Studies, Melbourne, 1996), p 55 cited in the ALRC - HREOC report *ibid*.

⁶³ The *Annual Report 1997-98* by the Inspector-General in Bankruptcy on the Operation of the *Bankruptcy Act*, Commonwealth of Australia indicated that the second highest cause of non-business bankruptcies was domestic discord. See p 1 and p 45 of the Report.

⁶⁴ McDonald, *op cit* n 18, Ch 8 Housing, at 152-4.

living in houses and only 3% in flats prior to separation. Between 70-75% of respondents either owned or mortgaged their homes in joint names. The amount of time lived in the matrimonial home prior to separation averaged between 5-13 years across the group surveyed, and many people had in fact lived there all of their married lives.

McDonald⁶⁵ described the first three months after separation as "a highly disrupted and emotional period." He explained that who stays in the home is highly related to the matter of who decided upon the separation, with the person who made the decision usually being the one to leave. When the family home is fully owned, the husband is more likely to remain in the home, whereas when the home is mortgaged, the wife is more likely to remain. McDonald reports that with public and private renters, however, men and women were equally likely to remain. In 36% of all cases where the children were with the wife in the first 3 months, the husband remained in the house while the wife left.

As for the final allocation of the family home McDonald⁶⁶ recorded that the home was sold just under 40% of the time, transferred to the wife just under 35% of the time, and transferred to the husband about 20% of the time. Sole occupancy by one of the spouses makes up the balance. These results are broadly equivalent to Bordow and Harrison's observations on the disposition of the matrimonial home⁶⁷. In the context of this paper McDonald concludes⁶⁸:

Finally, it is worth noting that although women with custody of the children were more likely to gain occupation of the house, it still remains that in 30 percent of cases (almost one in three) where the wife had custody and the house was not sold, the husband remained in the house as part of the settlement. This clearly runs counter to any suggestion that, as far as possible, the children's environment should be maintained.

McDonald clearly suggests that there are indeed many children who are compelled to move out of the family home as a result of the family breakdown.

To complete McDonald's analysis however, it is necessary to consider his findings as to housing at the time of interview⁶⁹. He finds that whilst it is true that the majority of children move out of the matrimonial home within a relatively short period after separation anyway, that does necessarily detract from the argument that the

⁶⁵ Ibid, at 155-158.

⁶⁶ Ibid, at 159-162.

⁶⁷ Bordow and Harrison, op cit n 33, at 272.

⁶⁸ McDonald, op cit n 18, Ch 8 Housing, at 161.

⁶⁹ Ibid, at 162-168.

environment of the child should be maintained. He concludes⁷⁰:

As the house is so important to so many Australians, is there a case (as in New Zealand law) for special treatment being given to the house in matrimonial property law? In particular, should a tenet of the law be that the matrimonial home, in all possible cases, be allocated to the custodial parent so that the environment of the children is maintained?

The facts in Australian divorces run counter to this tenet: 43 per cent of children left the matrimonial home at separation, 67 per cent had left within three years and 77 per cent within five years. ...there are indications from the analysis in this chapter that a separate provision relating to the house would be undesirable.

First, in 35 per cent of cases, the house was sold and sale of the house was related to economic factors which would have been extremely difficult to circumvent. Secondly, custodial parents who left the matrimonial home expressed high levels of satisfaction about their present housing... Thirdly, the evidence suggests that repartnering is much more likely for persons who leave the matrimonial home...

Despite these findings, it is still desirable in many cases that the children remain in the matrimonial home and this should be a discussion point in property settlements....

Despite the fact that many children leave the matrimonial home anyway, McDonald appears somewhat disquieted by the implications of these moves on children. He says⁷¹:

The other important feature of the house is that it is the home of the children. It provides not only the physical needs of space and shelter but also a focal point for the children's lives. The younger the child, the greater is the dependence on the home as a unifying force (Ochiltree and Amato, 1985, p.60).... Here, suffice to say that frequent reference is made to the fact that, following relocation, children of the marriage were forced to share a bedroom with each other, with step-siblings or on some occasions with the custodial parent. A deterioration of housing standards for children was much more frequently reported than improved standards.... This raises the question of the rights of children, as far as possible, to maintain their standards of housing and to remain within the environments to which they have become accustomed.

The issue thus becomes whether the interests of children should play any part

⁷⁰ Ibid, at 169-170.

⁷¹ Ibid, at 151.

in property distribution and, if so, how this can be achieved in a fair and consistent manner.

McDonald thus confronts one of the fundamental bases of the argument for special protection presented in this paper. He rejects the case for special treatment of the family home, but his rejection is by no means unqualified, particularly having regard to the interests of children.

McDonald's perceived disquiet about the deterioration of housing standards for children is not surprising. In any child-focussed debate of these issues, there must be an element of concern that children's interests are being subsumed to what Eekelaar⁷² described as the "very questionable philosophy" of "an attitude of commercialism towards the determination of domestic rights". His context was slightly different, but the comments remain apposite.

But it is submitted that McDonald's rejection of the case for special treatment can be confronted in other ways. Thus, in a child-focussed debate, does it detract from the argument in favour of enhancing stability for children that they have high mobility rates and move home anyway? Shouldn't the focus be on ameliorating the experiences of children post-separation of the parents, even if it is only for a limited period of time? The argument for special protection is not advanced on the basis that occupancy of the family home for the benefit of children will endure for their minority, or be imposed contrary to the will of the occupying spouse, or have total disregard for the interests of the non-occupying spouse. It is possible to address McDonald's concerns about children's housing standards whilst also addressing economic factors and the likelihood of repartnering. Despite McDonald's assertion that whilst some people could have made arrangements for a deferred sale "the vast majority rejected this option", nothing is known about the economic circumstances of the people to whom McDonald refers, the advice they received, and the other options and alternatives available to them. In short, just because the acknowledged needs of children cannot be met in all cases, that does not mean that the Australian family and civil law should not try to meet children's needs in some cases.

The only clear reasons McDonald found for the sale of the home were economic factors. But what if there was a policy shift which subsumed economic factors to child-focussed considerations? What if there was a heightened awareness of the emotional, psychological and physical impacts on children of a move away from the family home, particularly at or around the time of separation? This is a matter which will be considered immediately below. What if economic factors changed and it now became more affordable, for example, for women to take over mortgages on the home, or borrow to pay out their husband's share in the home?⁷³ The government's

⁷² Eekelaar, op cit n 4, at 97.

⁷³ The current economic climate in Australia (June, 1999), for example, consists of very low interest rates and very generous lending criteria. Within the writer's own family law practice women on social security and in receipt of child support have been able to raise mortgage loans of up to \$60,000, thus enabling them to keep the family home. Both the National Australia Bank and an originator like RAMS Homeloans Pty. Ltd. confirmed that all other

proposed reforms to superannuation laws may well lead to more meaningful adjustments of husband's superannuation entitlements reflected in wives being able to retain the family home. Shouldn't all of these factors not only help McDonald's child-focused disquiet to be understood, but compel a reconsideration of policies, laws, practices and procedures which directly and indirectly affect children at a particularly vulnerable time in their lives?

Despite McDonald's rejection of the case for special treatment of the family home, his study nonetheless recommended that one tangible way of meeting children's future needs, particularly as regards housing, was by way of lump sum maintenance. He notes that not only will this improve the housing situation of children, it will have collateral benefits as well⁷⁴.

It is clear, therefore, that McDonald did not resile from his statement that, at the very least, it is still desirable that the children remain in the matrimonial home, and he suggested one very tangible way of achieving this was through the provision of lump sum maintenance. McDonald's research pre-dates the child support scheme and the impact of child support will be considered below.

McDonald's analysis of housing was followed up by Funder, Harrison and Weston. They noted the continuing trend of moving out of the matrimonial home as time went by so that within seven years after separation 82% of divorced persons had moved from the matrimonial home. Specifically in relation to children they observed that children's mobility was high⁷⁵.

It is interesting to compare the mobility rates found by both McDonald and Funder, Harrison and Weston on the one hand to national figures on population mobility on the other hand. The Australian Bureau of Statistics reports⁷⁶ that between 1991 and 1996, 43% of the Australian population had changed their address. This represents 6.6 million people, 3 percent of whom stated as their main reason for moving marriage or defacto separation. This means 198,000 Australians who moved during this period did so due to family breakdown. McDonald states that 77% of children had left the family home within five years of separation, but the Australian Bureau of Statistics figures for population mobility by age and sex for a 5 year period indicates that it was only 49.6% for the age group 5-9, and 40.9% for 10-14. This suggests that mobility rates are significantly higher in minor children when their parents' marriage

lending criteria being satisfied, the fact that serviceability will depend in part on child support and/or social security is not of itself an obstacle to obtaining a home loan. Source: Terry Halpin, Manager Network Operations NAB, Kevin Lane, Manager, Lending Services, RAMS Homeloans Pty. Ltd.

⁷⁴ McDonald, op cit n 18, Ch 8 Housing, at 316-7.

⁷⁵ Funder, Harrison and Weston, op cit n 59, p 68-69.

⁷⁶ *1996 Census of Population and Housing, Population Growth and Distribution, Australia*, W McLennan Australian Statistician, Australian Bureau of Statistics Canberra, 1998 at Chapter 3 Population Mobility.

has broken down compared to the national average. This merely strengthens the argument that irrespective of predominant high rates of mobility in children not associated with family breakdown, there is an argument to give the home special treatment if it results in the impacts on children being reduced.

Impacts on Children

This section considers some of the literature which examines the social impacts on children of the changing family structure caused by separation. Some of this literature refers to the role played by the family home, directly or indirectly, in social impacts. Other literature is non-specific in relation to the family home but leaves the reader, lay or expert, with lingering concerns that the stability offered in the family home would have profound beneficial influences on what children experience.

Funder and Kinsella⁷⁷ refer to the sense of loss, risk of poverty, and chain of effects impacting on children as a consequence of separation.

The question must be asked whether maintaining the stability of the family home may have mitigated these experiences, even if it comes at an economic cost to the public? The cost argument is probably illusory. As other writers including McDonald have adverted to, the savings in public housing alone would be significant⁷⁸.

Weitzman⁷⁹ discusses and explores the impact of economic changes on children, drawing heavily from the research in this regard of Wallerstein and Kelly⁸⁰. In relation to residential moves Weitzman observes⁸¹:

Another major change was that the diminished income available for the wife and children often led to a residential move, and thus to unfamiliar neighbourhoods, friends and schools for the children. Within the first three years, almost two-thirds of the youngsters had changed their place of residence, and a substantial number of these had moved three or more times. Many of these moves were directly tied to economic factors - the need for cheaper housing, a better job, or more adequate child care arrangements.

These residential changes represented more than a change in lifestyle and standard of living for the children. They typically caused disruptions in the child's education, close friendships, and neighbourhood life. Even when

⁷⁷ Funder and Kinsella, "Divorce, Change and children: Effects of Changing Family Structure and Income on Children" (1991) (30) Family Matters 20-21.

⁷⁸ See 2.7 above generally.

⁷⁹ Weitzman, op cit n 56, at 318-322.

⁸⁰ Wallerstein and Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (Basic Books, New York, 1980).

⁸¹ Weitzman, op cit n 56, at 319-320.

teachers or friends were not particularly helpful, the familiar and relatively stable environment of a school had frequently become an important source of continuity in the child's life.

The effects of these disruptions in the child's home and school environments were heightened because they occurred simultaneously with the child's loss of one parent, and with the onset of greatly reduced care from the other parent.

It is interesting to note that Weitzman, like McDonald, notes that the reason for many moves out of the home were economic ones. Nonetheless, the impacts on children are profound and, significantly, Weitzman observes that the disruption to the children's lifestyles was "heightened" by the family breakdown i.e. the social impacts were exacerbated by the parents' relationship breakdown, but nonetheless existed independently of such breakdown.

Robinson⁸² focuses on young children in particular, and the importance of the family home for them in the context of family transition.

Garrity and Baris⁸³ explain the problem in terms of the achievement of environmental stability, and like Weitzman, explain that changes in environment are stressful for children, even without the overlay of family breakdown.

The writer found that there was very little data on the views of children about changes to housing and its impact on them. The report of Ochiltree and Amato however provides one exception. They found⁸⁴:

To further trace major changes in the lives of children and families we asked how often they had shifted house. Shifting often means loss of friends and a change of school for children. For some children this may be an exciting prospect, for others it is a traumatic time. Unexpectedly, more secondary school children (57 percent) than primary (38 percent) had not shifted house at all in their lives. More primary school children (20 per cent) than secondary (10 percent) had moved between three and five times. At both age levels it was more often the children in intact, two-parent families who had not moved at all or moved least. Children in one-parent families or step-families had moved most.

Of the primary children who had moved, more felt it was a negative experience (46 percent) than a positive one (31 percent), while others again

⁸² Robinson, *Family Transformation through Divorce and Remarriage: A Systematic Approach* (Routledge, London and New York, 1991), at 163.

⁸³ Garrity and Baris, *Caught in the Middle Protecting the Children of High Conflict Divorce* (Jossey-Bussey, San Francisco, 1997), at 16-17.

⁸⁴ Ochiltree and Amato, *The Child's Eye View of Family Life* (Australian Institute of Family Studies, Melbourne, 1985), at 42-43.

did not have clear feelings about shifting. One young girl who had experienced moving several times expressed one of the biggest associated fears:

I felt nervous. We hate going to different schools because when we get there we feel scared. (Girl aged 9)

Of particular interest is the finding referred to above that the frequency of moving home was much greater in families which have broken down, compared to families which remained intact.

Has therefore, the legal system let children down in failing to appreciate the important link between their well-being, and the stability offered by the family home? Funder, Harrison and Weston⁸⁵ would probably agree. They state inter alia, that children are left out of the equation when financial settlements are arranged between separated parents, and that their chance of regaining the pre-separation socio-economic status of their parents lies very largely in their mother's repartnering.

Finally the recent research by Wallerstein and Lewis⁸⁶ on the long term impact of divorce on children, demands some consideration in the context of childrens' housing needs. The research represents the first report from a 25-year follow up longitudinal study of the responses of children and adolescents to parental separation and divorce. The authors assert that there "is a serious gap between the perspectives of the legal system, as represented by judges, attorneys, mediators and mental health professionals, and the child, who is invisible and voiceless in the proceedings"⁸⁷. The research indicated that few of the adults who were children when their families broke-up even remember the intact family. What remains was "their sense of abrupt, sudden disruption of nurturance and protection..."⁸⁸.

Wallerstein and Lewis conclude as follows:

Recast in the light of this more accurate formulation, the protection of the best interests of the child involves not only how we can protect the child today, but, looking ahead, we must ask what measures will protect the child's interests when she reaches each new developmental stage of her growing-up years. What can we build in now that will protect her as she gets older, as she needs more? And as she expects greater respect and a voice in planning her life. There are plans of the table that have been languishing there for many years, which address the long-range financial needs of children and propose that

⁸⁵ Funder and Harrison and Weston, op cit n 59, p 237-8.

⁸⁶ Wallerstein and Lewis, "The Long Term Impact of Divorce on Children. A First Report From a 25-Year Study" (1998) 36(3) Family and Conciliation Courts Review 368.

⁸⁷ Ibid at 368.

⁸⁸ Ibid at 370.

*funds for the child's support can be allocated or put in trust before marital property is divided. These and other plans that encompass the experience of the real child in the real post divorce family are urgently needed to ease the plight of these children.*⁸⁹

*...Considering the enormous suffering of the children when family breakup coincides with the loss of parental care at home, one wonders whether it would be possible to build in a period of transition, which would protect the young children, enable the parents to move them gradually into more satisfactory, less hastily selected caretaking arrangements, and give mother more time to find a job that would better synchronize with the child's schedule.*⁹⁰

Their research and conclusions are both thought provoking and confronting. Whilst Wallerstein and Lewis do not specifically refer to the housing needs of children, their theme is very much one of adopting a longer-term focus on the needs of children, building in periods of transition, and minimising the otherwise precipitous changes which occur in their lives. The writer submits that, perhaps, one way to achieve this is to protect and preserve the child's stability in the family home. This may neither be the complete answer nor the only answer, but it may go a long way, some way towards "cushioning the blow"⁹¹.

The Family Home and Children: Summary

By way of summary, this sub-section has established that one of the reasons for extending protection or special treatment to the family home is because of the potential adverse impacts on child occupants of the home. It is well established that family breakdown affects the lives of tens of thousands of children in Australia each year. The breakdown of a family leads to changes in housing sometimes because the parent with children chooses to, but often because there was no other option. Even though the children of both intact and separated families were found to have relatively high mobility rates, that did not detract from the argument that children need to maintain their standards of housing and to remain within the environments to which they had become accustomed. For one thing, children in intact families have a greater capacity to cope with changes in housing arrangements, whereas the children of families which are separated are forced to cope not just with the consequences of a housing change, but with a broken family as well. There are well documented social impacts on children of loss of the family home, some but not all of which are linked to the fact that these changes related to family breakdown. These impacts include a sense of loss, a reduction in well-being, a greater risk of poverty, disruption to education, friendships, communal life and stability generally.

It is acknowledged that some change and disruption in the life of the children referred

⁸⁹ Ibid at 381.

⁹⁰ Ibid at 382.

⁹¹ Ibid at 370.

to above is inevitable whether it coincides with family breakdown or not.

It is also acknowledged that any intervention by the law which attempts to aid or protect these children, no matter how carefully considered and comprehensively executed, will not assist all children. But if the law can mitigate the adverse impacts on some children, that is both a laudable and achievable aim.

Australian law fails to achieve mitigation of the adverse impacts on children which are referred to above. As will be seen in section 3 of this paper, despite the rhetoric of the FLA that the interests of children are paramount, property adjustments between spouses fail to adequately provide for the needs of children referred to above.

It is possible, however, to understate the complexity of these issues, and the very difficult decisions which need to be made in certain cases. Thus, for example, is the moral claim to the preservation of the home for one spouse and their children dependant upon who leaves the home, on the length of the relationship, on whether one spouse repartners, or on whether the home was brought into the relationship? Whilst these are all relevant and weighty factors, the writer submits that primacy must still be given to the needs of children. It will be seen that other jurisdictions have achieved this end whilst still taking into account the factors set out above, and many others as well.

The Family Home - Avoiding Discriminatory Impacts

- 2.10 It will be argued in this section that both family law and civil law in Australia in relation to the family home is discriminatory against women. The loss of the family home disadvantages women far more than it disadvantages men. This disproportionate disadvantage is part of the broader gender-based difference in consequences of family breakdown, but it also has a very specific application in relation to the family home. Dealing with the latter, Watson⁹² states:-

In conclusion, it is clear from the preceding analysis that divorced women fare worse than divorced men in economic and housing terms. The discrepancies between men's and women's economic status in society appear to be further exacerbated by marriage, particularly where children are involved. Men's economic status does not however appear to be worsened by marriage, in fact the figures suggest that the reverse is the case.

She also noted⁹³ that the group to suffer most frequently from a deterioration in housing were younger women who had custody of children and whose family home had been sold. Watson observed⁹⁴ that men who head single parent families are more likely to be purchasing their own homes while female single parents were more

⁹² Watson, op cit n 5, at 18.

⁹³ Ibid at 16.

⁹⁴ Ibid at 20.

frequently located in the public sector. This was mainly attributable to the difference between male and female economic status generally, post separation. This meant that women were more likely not to have a deposit to acquire a new family home, or did not have the borrowing capacity due to low incomes.

Watson concludes⁹⁵:

Statistical evidence presented...revealed marked discrepancies between divorced men and women in income, employment and housing terms. The differences which exist between men's and women's economic status in society appear to be accentuated by marriage, particularly where children are involved. In contrast, men's economic status does not appear to be worsened by marriage. In economic (which for men implies considerable domestic support) terms, marriage enables men to be in full-time employment and earn higher incomes.....

These economic discrepancies have inevitable repercussions on the housing circumstances of men and women after divorce...

What then are the implications of these findings? To a great extent the inequalities between men and women's positions on and after divorce derive from the sexual division of labour in Australia where men are seen as the primary breadwinners and women's primary role is seen as being a housewife and mother within the home.... Until these fundamental structures are changed, women are likely to face greater housing problems on divorce than men.

Wulff⁹⁶ argues that quite apart from the problems for women caused by economic hardship, women experience other barriers in the search for housing, and faced the prospect of more frequent moves.

The broader gender-based differences in consequences of family breakdown are well documented, but a useful summary in the Australian context is found in Funder, Harrison and Weston who state⁹⁷.

Similar results were found in Weitzman's research in the USA⁹⁸.

Discriminatory impacts can occur at another level, and it is equally important to avoid those impacts. Any provision for special treatment of the home should be carefully framed so that it does not discriminate between families in at least four different

⁹⁵ Ibid at 95.

⁹⁶ Wulff, op cit n 25, at 37.

⁹⁷ Funder, Harrison and Weston, op cit n 63, p 237.

⁹⁸ Weitzman, op cit n 56, pp 337-343.