The division of matrimonial property in Australia

The way property is divided on divorce is a key issue for families, and one that has attracted considerable debate over the past two decades. Recent Australian Institute of Family Studies data provide an insight into the way in which women and men are dividing their property when they divorce, and what they consider to be a fair division.

In Australia, under the provisions of the Family Law Act 1975, the Family Court has a discretionary power to divide property on marriage breakdown, taking account of the parties’ past financial and non-financial contributions to property and to the welfare of the family, and the respective future financial needs of the parties.

However, empirical research conducted by the Australian Institute of Family Studies over the past two decades suggests that the legislative intention of the financial provisions of the Act may be inconsistent with the way property is actually divided.

This earlier Institute research found that the financial burden of divorce on women who have taken time out of paid work to have and care for children is not always reflected in a distribution of property that is sufficiently in their favour (McDonald 1986a; Funder 1992; Harrison, Funder and McDonald 1993). In addition, contributions to non-domestic assets, such as superannuation, investments, and businesses, is to a large extent attributed to the partner who contributed financially to its acquisition (McDonald 1986a). Thus non-financial contributions made to these assets, particularly the domestic activities performed by one spouse that frees the other spouse to work directly for financial reward, are disregarded when property is divided.

While the above research is often still relied upon, there is a clear need for up-to-date information on the division of matrimonial property in Australia, as emphasised by the Federal Attorney-General (1999). This need is based on two considerations. First, almost two decades have passed since the above groundbreaking research was conducted by the Australian Institute of Family Studies regarding property division on divorce – both privately negotiated and judicially determined settlements. This research was reported in the Institute’s publications *Settling Up: Property and Income Distribution on Divorce in Australia* (McDonald 1986b), and *Settling Down: Pathways of Parents After Divorce* (Funder, Harrison and Weston 1993). Second, since that time there have been a number of broad-based policy, economic and demographic changes in Australia that may have influenced the way in which property is divided.

One of the core changes has been the introduction of the Child Support Scheme (collection in 1988 and assessment in 1989) – a major legislative
reform that has arguably reduced the need for the day-to-day support of children to be taken into consideration in property proceedings. Another is the growth in women’s workforce participation during marriage (Wolcott 1997) which has increased women’s financial contribution to the matrimonial property and the welfare of the family, and may have improved their chances of being in, or finding, paid work when the marriage ends. The increasing tendency for couples to live together before marriage, and to marry and have children at a later age (de Vaus 1997a, 1997b), are demographic shifts that extend the period of time in which women lead financially independent lives: this may also result in increased contributions women make beyond the domestic assets of the marriage, and their financial resilience following separation and divorce.

There is clearly a need for up-to-date information on the division of matrimonial property in Australia (both privately negotiated and judicially determined settlements), especially in the light of the policy, economic and demographic changes that have occurred in the past ten years or so. This article reports the findings of recent Australian Institute of Family Studies research that examines these matters.

**Study of property division**

This article draws on data from the *Australian Divorce Transitions Project* to examine the extent to which the various contributions and needs specified by the Family Law Act contribute to the way property is currently divided in Australia.
Where possible, comparisons are made between the way in which property is actually divided and women’s and men’s own views on what constitutes a fair division.

The survey was conducted in 1997 and comprised telephone interviews with 650 divorced Australians, including those who settled their property matters privately. The findings reported here are based on a sub-sample of 513 men and women in the larger survey who had a child under the age of 18 years at the time of separation. This sub-sample was chosen because it ensures that, for each of the cases included in the analysis, the welfare of the children and the future needs of the resident parent may have been a consideration in the determination of the settlement, along with an assessment of non-financial contributions.

Respondents were asked detailed questions concerning the value of their property and how it was distributed, the extent of financial and non-financial contributions made, and the financial needs of women and men at separation. Respondents were also asked about other outcomes from the divorce such as the nature of their residence, contact and child support arrangements, and how fair they judged the property settlement to be. The answers to these questions provide a clearer sense of the ways in which property is currently divided, as well as divorced women’s and men’s perceptions of a fair division, and how trends in the division of property have developed over the past decade since *Settling Up* (McDonald 1986b).

The data analytic techniques employed to address the research questions were multivariate in nature. The statistical procedures used take into account the simultaneous effects of a range of factors (such as contributions, future needs and other factors) at the one time, effectively controlling for any effect of one particular factor on another in the model.

Specifically, the influence of the contribution and future needs factors on men’s and women’s reports of the wife’s share of property was examined using analysis of variance with multiple classification analysis. The effects of asset wealth and length of marriage were controlled for by including these two factors as covariates in the respective models. The influence of these same contributions and future needs factors on male and female respondent’s reports of how fair the distribution of property was to them were examined using sequential logistic regression. The actual share of property received was controlled for by entering this factor at the first step in the analysis. The above analyses were conducted separately for women and men.

Because of the complexity involved in reporting in full the results derived from such procedures, and given that only a sub-set of the factors that were included in these models are directly relevant to the research questions listed above, the following discussion of the findings will be limited to the interpretation of core significant effects that are of direct relevance to the research questions. (A Working Paper, detailing statistical procedures, method of analysis, and detailed findings, will be available from the Australian Institute of Family Studies in May/June 2000.)

**What is a fair settlement?**

In essence, the Divorce Transitions data suggest that current practice in dividing property does not reflect the full ambit of the legislative provisions. Non-financial contributions to non-domestic assets were unlikely to be reflected in the share of property received. As regards future needs, the needs of dependent children appear to have been the most important consideration, and the financial needs of the former spouse may have been overlooked. Women’s and men’s reports of a fair settlement are, however, consistent with the way property is divided. These findings are now considered in more detail.

**Share received**

More than one third of the respondents (42 per cent) reported that the wife received 60 per cent or more of the property. Only 29 per cent of women and men reported a division falling in the middle range of 40–59 per cent share received. There was significantly more variation observed in the share received for those with the highest level of asset wealth (that is, assets valued at more than or equal to $268,500) compared with those with the lowest levels of asset wealth (that is, assets valued at less than $114,000). Figure 1 illustrates the nature of these group differences.

The share received by the wife for the lowest asset wealth group, and to a lesser extent those with asset wealth valued at between $114,000 and $268,500, is concentrated at the top end of the distribution (that is, receipt of a majority share of the assets). In comparison, the share received by the wife for the highest asset wealth group is significantly more concentrated at the low end of the distribution.

Thus, while there is greater variation in settlement outcomes among the wealthier couples, women in this group are also more likely than other women to receive a minority share of the matrimonial assets. These findings are consistent with the Institute’s earlier findings (McDonald 1986a), confirming that there remains substantial variation in settlement outcomes under the current...
In the majority of cases, the relative share received by the former husband and wife is substantially different from a 40:60 division between parties.

To test whether this variation is in accordance with the current provisions of the Family Law Act, comparable measures to those used by McDonald in *Settling Up* (1986b) were employed to examine the extent to which contributions and future needs factors contributed to the share received. The findings from these analyses are now considered. (See boxed inset for measurement details on the factors referred to in the following discussion.)

**Financial contributions count**

Consistent with the *Settling Up* findings, data from the Australian Divorce Transitions Project indicated that the wife’s share of assets is reduced where non-domestic assets, such as investments, businesses and superannuation, comprise a high proportion of the couple’s asset wealth.

This finding suggests that direct financial contributions to non-domestic assets still have a major impact on the way property is divided, with the husband receiving the majority of these assets. On the other hand, financial and non-financial contributions made to the acquisition and improvement of domestic assets (such as the home and furnishings) appear to have been considered equal by the parties, with the majority share of these assets going to the resident parent – usually the wife – in recognition of her and the children’s future financial needs. The proportion of domestic to non-domestic assets that make up the total asset pool is thus a key source of variation between property settlements.

A number of trends in the data are also of note. In particular, men’s reports of their contribution to the value of the matrimonial home also predicted the share they received. Men who reported having made a greater contribution to the value of the home than their former spouse tended to receive a greater share of property than men who reported both parties as having contributed equally. This may be the result of some men having purchased the family home prior to marriage or having used funds acquired prior to marriage to finalise the purchase. Such an explanation for this pattern cannot be explored further using the Divorce Transitions data as respondents were not asked questions about the financial contributions they made prior to marriage, or those made by others.

Non-financial contributions to the day-to-day management of the household also appear to influence the share received, but in the reverse direction to that prescribed in law. Women who report having taken a traditional role in household management – that is, primary responsibility for the day-to-day care of children and cleaning, while the husband had primary responsibility for household maintenance and paying the bills – received a share of property well below the mean share for women overall. Conversely, women who reported sharing responsibility for all household tasks equally with their former spouse (including paying the bills) received a share of property above the mean share for women overall.

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**MEASURES USED IN THE STUDY OF PROPERTY DIVISION**

The following measures of contributions and future needs are comparable to those used by McDonald in *Settling Up* (1986), and are designed to assess, where possible, the factors specified in the Family Law Act. In addition to these measures, measures of children’s arrangements that were included in the analyses of perceived fairness are shown.

**Measures of contributions comprise:**

- the respondents’ report of their own and their former spouse’s contribution to household management during the marriage, including the extent to which the respondent and their former spouse took responsibility for paying the bills, cleaning, home maintenance, and taking care of children;
- the respondents’ report of own and their former spouse’s contribution to the value of the family home, either direct financial or non-financial means;
- time out of paid work during the marriage to have and care for children;
- non-basic assets as a proportion of total asset wealth.

Financial contributions made by the respondent prior to marriage or by others were not measured.

**Measures of future financial needs comprise:**

- whether the respondent had primary responsibility for the care of dependent children under the age of 18 years post-separation;
- whether the respondent was in paid work at the time of separation;
- highest level of education and occupation achieved;
- length of marriage;
- whether the respondent repartnered post-separation and divorce; and
- whether regular child support was paid or received.

**Measures of children’s arrangements comprise:**

- level of contact with children: shared arrangement; non-resident parent has frequent contact; and non-resident parent has limited or no contact;
- child support arrangements: regular child support paid or received; regular child support not paid or received;
- reported fairness of the contact arrangements;
- reported fairness of the child support arrangements; and
- reported level of conflict between the former spouses about the children one year after the separation.

**Source:** Australian Divorce Transitions Project, Australian Institute of Family Studies, 2000.
Further, the ‘future needs’ factors were not taken into account in a way that unduly favoured women at the expense of men – a criticism frequently directed at the government by men’s rights groups in reference to property reform (Kaye and Tolmie 1998). Irrespective of whether it was the former husband or former wife who was the resident parent, the share received shifted in favour of the resident parent. This occurred even if other needs did not appear significant (for example, the resident parent had remained in the workforce throughout the marriage and was in paid work at the time of separation).

This finding is not surprising given the increasing emphasis over the past decade on protecting the interests of the children of the marriage, the continuing responsibility of both parents to look after their children, and reducing state costs in their upbringing when the marriage ends.

Significantly, respondents’ actions in dividing property in favour of the resident parent were generally consistent with their perceptions of fairness regarding other aspects of their children arrangements. This suggests an overall child-orientated motivation in divorce settlements. The likelihood of men and women judging the property settlement as fair increased if they thought the child support arrangements were fair, irrespective of the share of property they actually received. In particular, those men who reported the child support arrangements as being fair also tended to report frequent contact with their children and that they were happy with the contact arrangements made. In other words, the happier these men were with the children's arrangements, the happier they were with a settlement that favoured the resident parent – a finding that replicates similar research in the United States (Sheets and Braver 1996).

Understanding why women’s evaluations of the child support arrangements were related to their judgements of the fairness of the property settlement also requires consideration of the nature of the children’s arrangements made. In particular, those women who were unhappy with the child support arrangements were more likely than other women to report not having received any child support from a liable former spouse.

Taken together, the findings for men and women demonstrate a strong interdependence between a party’s satisfaction with child and property arrangements. It appeared that the financial and contact arrangements made for children were a key source of distress affecting women’s and men’s satisfaction with the way their property was divided.

In contrast, responsibility for the future needs of the spouse (independently of concerns for the welfare of the children), appear to have been governed by a very different ideology – that of a

The data also provided insight into the extent to which women’s and men’s reports of fairness reflected consideration of the parties’ respective contributions. The greater the percentage of asset wealth accounted for by domestic assets such as the family home and furnishings, the fairer men reported the settlement to be, even though the more domestic assets were in the pool, the more the wife received. This finding is consistent with the argument made earlier that, for the majority of women and men who divorce, non-financial contributions and future needs are taken into account only in the division of the domestic assets of the marriage, and that these entitlements, when restricted to domestic assets, are considered fair.

However, men who reported that they contributed more (financially or non-financially) than their former spouse to the value of the family home – the primary domestic asset – were less likely to report the property distribution as fair than men who reported that their former spouse contributed equally to the value of the family home. This particular finding cautions that while the parties’ respective contributions are an important consideration in judgements of fairness, an equal emphasis on financial and non-financial contributions to the domestic assets is not always seen to be fair, particularly when a party believes they made the more significant financial contribution.

In sum, the findings provide support for the debate discussed above that equity in the division of matrimonial property is not always realised under the current Act. Some 15 years on from Settling Up, definitions of ‘communal’ property remain restricted to domestic assets having not kept pace with modern notions of marriage and other social, economic and investment trends.

Children first

As outlined earlier, after contributions, the second part of the property division equation is future needs. Here, the data are again consistent with Settling Up and confirm that, of the future needs factors tested, responsibility for the care of dependent children remains the most influential in predicting the share of property a party receives.
'clean break' and the cessation of any ongoing responsibility for one another’s welfare on divorce. While the data suggest there was some recognition of the needs of women at the end of long-term marriages, the extent of the wife’s involvement in paid work during the marriage and at the time of separation, and responsibilities taken for the maintenance of the home and the care of the children during the marriage, did little to increase her share of the property. Nor were the future needs of the former spouse taken into consideration via the payment of spousal maintenance. Spousal maintenance in this sample was ‘rare, minimal and brief’ (Behrens and Smyth 1999: 21), and was predominantly paid out as bridging-finance until the property matters were finalised rather than as a form of ongoing financial support (Behrens and Smyth 1999).

Consistent with the findings described above, the future financial needs of the former spouse appear to have little direct influence on men’s or women’s reports of fairness. Surprisingly, with one exception, future financial need was unrelated to women’s reports of fairness. The exception was that those women who had spent an extended period of time out of paid work during the marriage were most likely to view the settlement as fair. This suggests that women, particularly those from more traditional marriages, may underestimate their entitlement to matrimonial property based on their own financial need (independently of the needs of the children). Such an exception is consistent with the findings reported by Behrens and Smyth (1999) that women who had spent more than one third of the marriage out of paid work – typically to have and care for children – were the least likely to support the payment of spousal maintenance.

In sum, the findings provide support for the view that, in practice, the adjustment made to property interests in recognition of the wife’s future financial needs may be inadequate. A remedy for this shortfall is, however, dependent on two factors. The first is the extent of asset wealth available to the parties on divorce; the second is the capacity of the former spouse to pay ongoing support to this spouse in addition to any ongoing financial commitments that he or she may have to their children.

**Conclusion**

Analysis of the data from the Institute’s Australian Divorce Transitions Project suggests that women and men evaluate a settlement as fair when the division of property reflects financial contributions to the marriage and concern for the welfare of the children. To this end, the principles that govern women’s and men’s perceptions of a fair settlement are reflected in outcomes of property division. The law is thus being applied in a way that is consistent with notions of fairness currently held in the community.

However, despite this consistency, it appears that little has changed since the publication of the Institute’s *Settling Up* (McDonald 1986b) in the way matrimonial property is divided, and criticism of the law’s failure to deliver equity and justice in the division of property remains relevant. In particular, women’s and men’s reports of property division and perceptions of fairness did not reflect a sense that women are entitled to non-domestic assets based on their non-financial contributions, and on their own financial needs post-separation and divorce.

Taken together, these findings highlight the challenge faced by policy makers in the area of family law in aligning substantive law with people’s subjective notions of justice, while at the same time drafting legislative provisions which encourage women and men to divide their property in a way that ensures each party receives a just and equitable share. While the current Family Law Act provisions succeed in doing the former there remains some concern as to whether the latter aim is being achieved.

**References**


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This article is based on their longer *Working Paper*, which provides statistical procedures, method of analysis, and detailed findings, due to be published by the Australian Institute of Family Studies in May/June 2000.