Is Equality the Death of Marriage?

by the Rt Hon Baroness Hale of Richmond

The decision of the House of Lords in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 WLR 1283 struck blows for the traditional housewife (including a trophy housewife) and mother, but in the media greater equality for the stay at home wife was greeted as "the death of marriage". This is ironic, as John Eekelaar points out, because if the decision had not been made in the way that it was, it is likely that wives would have been in an even better position.¹

Rather than to discuss the minutiae of the House of Lords’ approach to ancillary relief, I would prefer to take the long view. How far have we come towards equality in marriage? How did we get there? What do we mean by equality anyway? And does it inevitably lead to the death of marriage?

Some history

To begin at the beginning – the Matrimonial Causes Act 1857, which introduced judicial divorce

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to my country. That great jurist, A V Dicey, saw divorce law as an instance of the struggle between the interests of the individual and the interests of the State. 2

"If marriage be looked upon mainly as a contract between man and wife it is obviously reasonable to put an end to a marriage of two persons when it causes deep unhappiness to both, or when it causes misery to one party and gives very little happiness to the other ... But if divorce be looked upon mainly from the point of view of a sane collectivist, the question whether divorce should be facilitated becomes an inquiry far more difficult to answer. Marriage, he will argue, when treated as a union which hardly admits of dissolution, confers great benefits upon the State ... [For him] the relief which divorce may give to an individual suffering from an unhappy marriage cannot be a decisive consideration."

But why should indissoluble marriage be thought to confer great benefits upon the State? If marriage is mainly for dynastic purposes - establishing the legal link between a man and his children for the purpose of orderly transmission of property and status across generations - there is no need for it to last forever. Indeed, that can be most inconvenient, as Henry VIII found out. But if marriage is mainly for looking after the family - its own little social security system, a private space separate from the public world, in which husband and wife can look after one another and their children - then of course the State will have an interest in keeping it going. The more the family can do, the less the State will have to do. The sane collectivist will want to strengthen family ties and family responsibilities.

If so, three modern trends in family law should be welcomed rather than deplored. One is the great improvement in marriage law's treatment of the homemaker and caregiver over my professional lifetime. Another is the extension of marriage or its equivalent to same sex couples. The third is the extension of some of that improvement to relationships outside marriage. Each one of these has, of course, been fought by sections of the media. Each does, of course, threaten the domination of the breadwinner. It also - as Dicey did not foresee - renders individual marriages more unstable. But does it undermine the institution itself?

When I studied Family Law in the mid 1960s, the leading textbook boldly asserted that, now that the old common law doctrine that husband and wife were one person had been abandoned, both were now co-equal heads of the household. The first was true, but the second most certainly was not. The old common law doctrine that husband and wife were one person, personified in the husband, had been replaced by a doctrine that they were for all legal purposes two separate people. Neither had any automatic claims on the property of the other. Once tax law had caught up and treated each spouse's tax affairs separately, neither had any right to information about the other's financial affairs.

But all this happened at a time when most people still ordered their lives in gendered ways, with a male breadwinner and a female homemaker and child-rearer. For some this was a matter of conscious choice. For others, it was virtually forced upon them by discrimination in the workplace. My mother trained as a teacher in the 1930s, but was not allowed to continue teaching when she married my father. Many such marriage bars disappeared during the second world war, but some reappeared or were retained for much longer - for example in the diplomatic service. Even if women were allowed to continue working, it was commonplace for there to be two rates of pay for the same job - the women's rate and the men's. And, of course, many women were still segregated in women's work, which was conventionally less well paid because men had to be paid a wage sufficient to support a family whereas women did not. It was a matter of pride for many working and lower middle class men that they earned enough that their wives did not have to go out to work. The lack of access to reliable contraception and affordable child care completed the picture. Polarisation of roles, except where the wife had significant family money or a serious career of her own, was almost inevitable. I cannot be the only woman growing up in the 1950s and early 1960s who assumed that I could have a career or a family, but not both.

The upshot of all this was that in most families, the property was owned by the husband. The family home was usually owned or rented in the husband's name. The wife had a right to live there as long as she behaved herself But however well she behaved, her husband could sell or mortgage it behind her back. She could only claim a share as a result of contributions in money or money's worth to its acquisition or improvement. But her work about the home and family was not seen as "money's worth". The courts had no power to award her a share in recognition of her place in the family.

Her husband did have a duty to maintain her. But while they lived together, he could choose how
to do this. At one extreme, he could decide to pool all their resources in a joint account; at the other, he could do all the shopping himself and give her no money at all. Once they were separated, she might be awarded maintenance, but only if she had behaved herself during the marriage and continued to do so while they were apart. The principle was that everything belonged to the husband and, no matter how badly he had behaved, he only had to provide for a completely blameless wife. (The divorce law which catered for the upper classes was kinder.)

These separate property principles stood side by side with the common law doctrine that the husband was sole guardian of his wife's children. The wife only got any rights if he died or a court gave her some. It all meant that the wife's behaviour was central to what she might expect if the couple parted. If she was at fault, she stood to lose her home, her livelihood and her children. These were all powerful incentives, especially for a middle class homemaker, to stay at home and in line. The consequences for the husband who was at fault were very different. He could keep his property, he could keep the major part of his income, and he could usually keep a fatherly relationship with his children. It is not surprising that the decent thing for him to do was to shoulder the blame for the divorce; but if he did not do the decent thing, a great deal of time and money was spent deciding which of them had been to blame.

Steps forward

It is amazing to me now how calmly we family law students of the 1960s accepted all this. So how did we get from there to where we are now? The first step was the Matrimonial Homes Act 1967. This for the first time made no distinction between husbands and wives in the rights and remedies it gave to the spouse who was not the legal owner or tenant of the family home. This was followed in the major reforms of divorce law enacted in 1969 and 1970, which came into force in 1971, and are still contained in our Matrimonial Causes Act 1973, albeit much amended.

For the first time, family law became sex neutral, in that the same rules and remedies applied to husbands and wives, fathers and mothers. The law could now contemplate, in theory at least, a househusband or the equal sharing of homemaking and breadwinning roles. The remedies available to the homemaker both during and after the marriage were vastly improved. The right to live in the home could be protected against third parties — creditors, purchasers and landlords. The home itself could be transferred or shared if the marriage broke down. The divorce courts acquired comprehensive powers to redistribute all the assets — whether property, capital or income — of both parties. In doing so, they were directed to take a long list of factors into account. Unlike your legislation, the same list applies to both income and capital provision. It includes the contributions which each of the parties has made (and will continue to make) to the welfare of the family. It makes no reference to their contributions to the value of the assets.3

Also unlike your legislation, ours did initially have a statutory objective. It did not, as Richard Chisholm has put it, simply tell the driver how to drive but give him no indication of where to go. Our courts were told to use these powers so as to place both parties, so far as it was practicable and having regard to their conduct just to do so, in the financial positions they would have been in had the marriage not broken down.

John Eckelaar called this the minimal loss principle, but I call it the principle of equal misery. The objective was, of course, not possible. But it suggested a sort of equality between the parties — as they would have had roughly the same standard of living if the marriage had not broken down, the court should attempt to produce as close as possible to the same standard of living for each. It also suggested that this equality should continue indefinitely because the assumption was that the marriage had not broken down. It also had the effect of treating each party's conduct on an equal basis — because conduct was only taken into account where it was "just" to do so. Only if one party was very much more to blame than the other should their conduct count — a concept summed up in Ormrod J's well-known phrase "gross and obvious".4 So no longer would a wife's prospects crucially depend upon how she had behaved during the marriage and thereafter.

Reasonable requirements

But practitioners are slow to change their ways even when a legal revolution has taken place. Before the new law, they had been mainly focused on need and after the new law they remained mainly focused on need; now more generously defined as "reasonable requirements". This meant that the homemaker and child-rearer did a great deal better than she had
ever done before. The children needed a roof over their heads. So the courts tried hard to preserve the family home for their benefit. Sometimes this was done by delaying the share-out. But increasingly it was done by trading any right to continuing maintenance in return for the husband’s share of the home. At the moment of the divorce, therefore, it could look as if he had lost his wife, his children and his main asset, their home. He would not know that his unimpaired earning capacity and pension entitlements would often put him back where he had been before within a relatively short time.

This was still not true equality. It was still providing for the needs of the wife and children rather than giving them an equal share in the marital assets. But it meant that an increasing proportion of divorces could be accompanied by a clean break: the less well off by trading the claim to future maintenance for the husband’s share in the home, the better off by capitalising the wife’s reasonable requirements over time in a lump sum calculated according to the Duxbury formula. In the middle, there would still be some husbands paying long term and substantial maintenance which they very much resented, especially if they thought that the wife had been more to blame for the break-up than they had been.

The Law Commission was asked to review the law – but only as to financial provision, not property and capital adjustment. The result was that in 1984, the statutory objective was repealed. It became entirely unclear what end result the courts were supposed to be trying to achieve. Unlike your court, they were at least told to give first priority to the needs of minor children. So they continued to focus on reasonable requirements. But they now had a statutory instruction to consider a clean break and to contemplate the wife achieving “self-sufficiency” within a reasonable time. The main losers for a while may well have been middle aged housewives who were told to go back to work when they had little realistic possibility of doing so. This was deeply unfair to the traditional housewife, yet I do not remember the Daily Mail attacking the 1984 Act.

If anything, the reasonable requirements approach was reinforced by later developments. The Court of Appeal held that time-limited maintenance orders should not be made when self-sufficiency was not a realistic option. Parliament began to intro-
duce pension earmarking and sharing powers, to tackle what for us is a serious problem.9 Our occupational pension schemes give periodical payments, based upon the final salary or money purchase, rather than lump sum superannuation. But why should a wife expect to share in far distant future income once the statutory objective had gone? Reasonable requirements, justified as compensation for marriage generated disadvantage rather than life-long provision for need, might have been the answer. But the rationale was not much discussed. Still noone talked about equality.

The yardstick of equality

Then along came White v White [2001] 1 AC C 596 in the House of Lords. Looking back, it is hard to understand how White could ever have happened. It ought to have been obvious on its facts – a long marriage during which significant assets had been accumulated by the hard work of both, with some early financial help from the husband’s family. That the wife did so badly at first instance is only explicable by the profession’s fixation with reasonable requirements as a ceiling rather than a floor. I remember practitioners talking of the “discipline of the budget”, great forensic minds poring over the minute details of how many times the wife needed to go to the hairdresser, and pouring scorn on the idea that it might be reasonable to give her a surplus to save for a rainy day or to leave to her grandchildren.10 These attitudes may have been understandable, if regrettable, when applied to a pure homemaker’s claims. But they were downright insulting when applied to the claims of a spouse who had made a considerable economic contribution to the family’s assets. It is not surprising that the House of Lords knocked on the head the idea that reasonable requirements could operate as a ceiling on claims, and instead adopted the “yardstick of equality”. The statutory checklist had still to be applied – but the result should then be checked against the “yardstick of equality”. It was impossible to measure financial and domestic contributions against one another and therefore they should be assumed to be equal. All this talk of equality was radical indeed.

However, unanswered questions remained. Equality of division is only one sort of equality. It would lead to severe inequality of result in the many cases where the breadwinner has a substantial earning capacity and the homemaker does not. We in England and Wales do not want to have equality of division if an unequal division is necessary to make adequate provision for the children and their carer. But there are increasing numbers of cases where both have a reasonable earning capacity and it makes sense to divide up their marital assets equally and let each go their separate ways, even if thereafter one will fare better than the other.11 But what about the mega-rich? Equality of living standards might be achieved without equality of division, leaving the money maker to keep the lion’s share of his profits. The profession had little need to talk of special contributions while reasonable requirements held sway – except perhaps to increase the weight given to the claimant’s contribution, as in Conran v Conran [1997] 2 FLR 615. But once the yardstick of equality took over, they began to look for reasons to depart from it. They looked to the Australian case law for inspiration, but without any of the warrant given by the Australian legislation, and discovered the notion of the “stellar contribution” of the entrepreneur.12 Ironically, this was just as Nicholson CJ was suggesting13 that it ought to be reconsidered. It was difficult to reconcile with the White commitment to gender equality. Many also agreed with Coleridge J that comparing domestic and wealth-creating contributions “is much the same as comparing apples with pears and the debate is about as sterile or useful”.14 As Patrick Parkinson has put it, the Court of Appeal was persuaded to “retreat from its embrace” of the Australian doctrine in Lambert v Lambert [2002] EWCA Civ 1685; [2003] Fam 103.

But although White changed the whole language, it still left many questions unanswered. In particular, what outcome should the presumptively equal contributions to the marriage produce? Equality of division may be the yardstick, but we all know that there are many cases in which equal division will help the breadwinner far more than the homemaker and the children. Equality of living standards throughout life is no longer justified once the statutory objective has gone. But equality of opportunity could be: in Miller and McFarlane, I suggested that the ultimate objective is “to give each party an equal start on the road to independent living” (para 144). Some would, of course, need a helping hand for a long time.

In McFarlane, we were concerned with the rationale for continuing periodical payments once the marital partnership had broken up and the marital assets shared. I agree with John Eekelaar16 that the best rationale is compensation – either for needs generated by the relationship or for benefits
foregone during the relationship, rather than as a continuing share in the assets – unless there has been a discernible contribution to the other’s enhanced earning capacity. But in principle, where the capital assets are enough to cater for the relationship-generated needs, there should be no continuing provision. The partnership has now been broken, and there is no presumption of continued sharing in future benefits.

**Significant wealth and stellar contributions**

But what about the cases where big money has been generated during the marriage by the commercial activities of one, while the other attended to home and family or pursued a less lucrative career? In *Miller*, we had to compare the apples and pears in the context of a short marriage during which the husband had acquired huge but unquantifiable wealth. One approach might simply be to divide up the marital acquest half and half. In most short marriages little would have been accumulated, so it would not matter – the *Foster v Foster* approach of giving each back what they had brought in and dividing the marital acquest equally would work very well.

Everyone agreed that the wife was not entitled to a 50% share. But on what basis is the supposedly equal contribution of the homemaker discounted in a short marriage? The reason, it seemed to me, was that money can be made in an instant – whereas it takes more than one good meal, one good night in bed, one glittering appearance at a cocktail party, to develop a domestic contribution. I would therefore have distinguished between assets acquired for the use and benefit of the family – which should be shared between them – and pure business assets to which a discount should be applied to reflect the short time during which she had made any contribution at all (as suggested by Rebecca Bailey Harris[17]). As expert family lawyers, you will all have realised that this supposedly rabid feminist was actually more cautious than Lord Nicholls. He would have adopted a norm of equal sharing of all marital assets, by which he meant everything acquired after the marriage.

But whether you take my more cautious
approach, or Lord Nicholls’ more adventurous one, we all agreed that the parties’ contributions should be treated in the same way as their conduct – only to be taken into account at all if the disparity between them is so great that it would be inequitable to disregard them. This is easy to say, but not so easy to operate. If you take the view that the different contributions are basically of equal value, how do you quantify the exceptions? As Patrick Parkinson points out, the strongest argument against the doctrine of special contributions is that it is difficult to develop any coherent principles of quantification – “However long the judgments, ultimately these cases are decided under palm trees”.

In Charman v Charman [2006] EWHC 1879, the first big money case to be decided after Miller and McFarlane, Coleridge J divided the huge assets derived from the husband’s business activities over a long marriage roughly 63% to the husband and 37% to the wife – suspiciously close to the old one third approach. He once again pointed out that there was no sensible basis for quantifying the difference, and pleaded for some sort of rule of thumb to make settlements easier:

“In a field as discretionary as this one it is often hard to provide real guidance which limits rather than promotes debate. Pandora is constantly vigilant for opportunities to unlock the box. With the arrival of Miller/McFarlane I hear the rattling of keys.”

A pure equality of division of acquists might have silenced the rattling of keys – but it clearly would not have been right in those cases where the homemaker requires more than an equal division to enjoy an equal start in life. Nor is it likely that the profession will give up their search for reasons to depart from equality in the truly big money cases. In Charman, Coleridge J applied the concept of special contributions, even though he himself is against it and there is little in Miller to support it.

Recognition of homemaker

Nevertheless, this all adds up to a considerable shift in favour of the homemaking and childrearing role over the past three decades – a shift which I sense is greater than yours. At the same time there has been a considerable shift in people’s attitudes and behaviour. In the 1960s, when this story began, almost everyone got married. There were at long last more than enough young men to go round. The age of marriage had been going down. Very few people divorced. The numbers of divorces had leapt at each increase in accessibility – a change in the grounds, the availability of legal aid, and the simplification of procedures – but had soon settled back. It was still not a mass activity. Fertility rates remained healthy. Women were having more than enough babies to replace the population. The great majority of these were born in wedlock. For those conceived outside marriage a hasty “shotgun” marriage or a placement for adoption with strangers were the usual solutions. Living together outside marriage happened but was not counted – there being no occasion to bring it to the attention of bureaucrats who do the counting. It was thought to be a short term or transitional arrangement rather than a permanent substitute for marriage.

The flight from marriage

But just as marriage was becoming more friendly to the homemaker role, it began to lose its universal appeal. Marriage is still the most popular option in the long run, but it is no longer regarded as the only acceptable one. As in Australia, UK cohabitation rates have steadily increased and marriage rates have decreased. Our Government Actuary’s Department has calculated that by 2031, one in four couples will be cohabiting rather than married. Cohabitation has certainly taken over from marriage as the most common form of first relationship. Nor does the advent of a child necessarily change this. In 1989, 70% of the population thought that “people who want to have children ought to get married”. By 1994, this had dropped to 57% and by 2000 to 54%. Older people are much more likely to think this than younger. So by 2000, well under 40% of people in the child-bearing age groups (18 to 44) believed that “people who want children ought to get married”. Most children in the UK are still born within marriage, but by 2003 the percentage born outside marriage had risen to 41%. Most of the increase is due, not to a rise in traditional single motherhood, but to an increase in children born to cohabiting couples.

Why should this flight from marriage have taken place? I could understand a principled feminist rejection of marriage in the days when it simultaneously forced women into the homemaker role and then discriminated against that role. I find it much more difficult to understand now that we have a marriage law which regards the couple as two independent individuals while they are married, allows them complete flexibility in the way in which they organise their lives, and tries hard to protect
and compensate the homemaker if they part. We also have anti-discrimination laws which try to give women equal pay for work of equal value and protect them against discrimination on grounds of marital status. So there is less external pressure to adopt the homemaker role if they do not wish to do so. No one suggests that real equality in the workplace has yet been reached — we still have a large gender pay gap in lifetime earnings, and an even larger mother pay gap. But this is much reduced for better qualified women.

But only lawyers and legislators look to the law to explain people’s behaviour. Social scientists have called this the policy maker’s “rationality mistake”. People do not order their personal and emotional lives in such a rational way. It would be extraordinary in this romantic age if they did. UK researchers have found three broad attitudes to cohabitation outside marriage — cohabitation as a prelude to marriage, cohabitation as a trial marriage, and cohabitation as an alternative to marriage. Only the last is a deliberate rejection of marriage.

But most of the cohabitants they researched were not specifically rejecting marriage. Those who cohabited as a prelude to marriage were trying it out with a view to marrying if all went well, or in the vague expectation that they would eventually marry. But this can drag on for quite some time, turning into cohabitation as a variety of marriage. These people saw themselves as good as married. They were as committed to one another as any married people. They just couldn’t see the point of a cheap and simple wedding. If they got married at all, they wanted something elaborate and expensive. For them, marriage might still be seen as an ideal arrangement, but too soon, too expensive or too important to undertake just yet. This fits in well with the suggestion from US research that people tend to defer marriage until they feel financially secure: that “people marry now less for the social benefits that marriage provides than for the personal achievements it represents”.

**Position of cohabiters**

There is also very little evidence that even the people who deliberately reject marriage know much about the different legal consequences of marriage and cohabitation. Those differences are greater in my country than in yours. We still do not have legis-
lotion extending any of the matrimonial remedies *inter vivos* to the "de facto" spouse. There are no automatic rights of succession on intestacy, although claims can be made under the Inheritance (Provision for Family and Dependants) Act 1975. The Law Commission has recently suggested that there should be power to award financial provision – but not on the basis of need or sharing. Both of these stem from commitments given at the outset of the relationship. In their view, the basis for ordering provision when a non-marital relationship ends is the effect that the relationship has had on their respective positions when they leave; either that one party's position has been improved by the retention of some benefit arising from contributions made by the other during the relationship, or impaired by sacrifices made as a result of contributions to the relationship or continuing child care responsibilities afterwards.\(^{22}\)

This is deliberately designed not to give people the same rights that marriage would bring. But in that great majority of cases where needs are the result of relationship generated sacrifices, and sharing has to give way to needs, the results in practice ought to be much the same. Does that mean that people will be even less willing to marry? I doubt it. People very rarely take legal advice before cohabiting or marrying. Very few cohabitants take the obvious steps, such as making a will or a written agreement about ownership of the home. There is a widespread belief in the myth of the common law marriage, as high as 59% amongst those most likely to lose out by their mistake. Even among people planning to marry, 41% thought that getting married would not change the legal nature of their relationship.

And yet, it is difficult to ignore the very good reasons for the economically stronger party not to marry. Tony Honore, Regius Professor of Civil Law in the University of Oxford, made the following comment in his Hamlyn lectures, published in 1982:\(^{23}\)

"In our pursuit of security for the weak we have overlooked the paradoxical fact that the interests of the weakest often depend upon the security of the strong."

In other words, if I understand him aright, you will only persuade the strong to give their protection to the weak if their own security is not too much endangered by doing so. He predicted that the more protection marriage gave to wives, the more reluctant men would be to become husbands. He also acknowledged the near-impossibility of proving this. Marriage rates have of course fallen over this period, but *post hoc* does not necessarily mean *propter hoc*.

### Gender and independence

What may not have occurred to anyone then was that some of these disincentives now apply just as much to the modern woman as they do to the man. These days, the woman may well be the economically more powerful partner, especially at the beginning before they have children. Mrs McFarlane sometimes earned more than her husband when she was a City solicitor and he was a City accountant. More and more women see themselves as economically independent, and are reluctant to give up that independence if and when they marry. Mavis Maclean and John Eekelaar, in their small scale study of risk taking in family relationships, found an "almost universal awareness of the economic vulnerability of women. ... This vulnerability was firmly linked to gender and child care responsibilities".\(^{24}\) So there may be fewer and fewer women prepared to risk relying on a man for their security, and also fewer and fewer who see the need for it.

It is also possible that women who are economically successful and independent may not yet have acquired the same highly developed sense of responsibility for their weaker partners that the best of men have had for centuries. Mr Cowan, you may remember, had the vision to invent black bin liners on a roll divided by perforations. It made his fortune. If Mrs Cowan had invented the bag on a roll, would she have been any more happy than her husband to share the proceeds equally with him when they divorced? Dual career families appear to be less likely to pool their entire incomes than the more traditional breadwinner/hOMEMAKER family. There are certainly hints in Miller that truly dual career families might continue to order their financial affairs separately after divorce as they had done during the marriage.

So if there are economic explanations for our current trends, they may apply as much to economic woman as they do to economic man. But that case is not proven. In the meantime, what should we make of it all?

### Some concluding thoughts

I do not see how we can possibly put the clack back to the good old days of inequality within marriage. That cat is well and truly out of the bag. But a democracy of two is inherently unstable
because no-one has the casting vote. We should not be surprised if marriages based on a combination of free choice of mate, the expectation of personal happiness and equal status within the relationship are more likely to break down than marriages entered into for convention or convenience, with little expectation of lifelong happiness, and where one party is infinitely more powerful than the other.

On the contrary, I think that we should continue our efforts to achieve a genuinely partnership view of marriage, in which each may play a different part at different times in their lives, but each will take an equal share in the partnership assets. My caution in Miller and McFarlane had more to do with my familiarity with the legislators’ intentions and my perception that equality is itself a complex goal than with any anti-equality ideology. I strongly believe in what I said in the Court of Appeal case of SRJ v DWJ [1999] 2 FLR 176, 182. This was a classic case of a long marriage with four children, where the wife had given up work as a teacher to look after the family:

“Over the many years of that marriage she must have built up an entitlement to some sort of compensation for that. It is not only in her interests but in the community’s interests that parents, whether mothers or fathers, and spouses, whether wives or husbands, should have a real choice between concentrating on breadwinning and concentrating on homemaking and childrearing, and do not feel forced, for fear of what might happen should their marriage break down much later in life, to abandon looking after the home and the family to other people for the sake of maintaining a career.”

If, which is not proven, increasing equality in marriage is deterring men and women from marrying, we should, I think, regard this as a bad thing – a bad thing because marriage has always been good for men and is increasingly good for women. This makes, to me, a good case for adopting some of the principles which apply to marriage in non-marital relationships. I gather that your marriage cohabitation trends in Australia are very similar to ours in the UK, but your cohabitation rates are certainly no higher than ours, which rather suggests that the existence of remedies for de facto spouses has had no discernible effect.

We will, however, face increasing pressure to recognise pre-nuptial agreements. You have recently
done so and I would be interested to learn how it is working out. The Mr Millers and Mrs Horlicks of this world will want to limit their exposure. But I doubt very much whether Mr Cowan or Mr Charman would have considered it when they got married, long before they made their fortunes. Shouldn’t marriage mean the same for everyone? Or does your experience suggest that we should let them contract out of our current commitment to real rather than formal equality? Do we need to surrender an important principle to preserve the institution? If we do, is the institution itself worth preserving?

NOTES

2 Lectures on the relation between Law and Public Opinion in England during the Nineteenth Century.
3 The other factors are their actual or foreseeable financial resources and needs, the standard of living enjoyed during the marriage, their ages and the duration of the marriage, any physical or mental disability of either, (now) their conduct if it would be inequitable to disregard it, and the value of any benefit which, because the marriage is dissolved or annulled, a party will lose the chance of acquiring: MCA 1973, s25(2).
6 MCA 1973, s25(1).
7 MCA 1973, s25A.
10 The high-water mark may be Page v Page (1981) 2 FLR 198.
16 Loc cit.
18 Loc cit.
22 Loc cit. See also the Overview paper obtainable from the same website.
23 The Quest for Security Employees, Tenants, Wives, Stevens, 1982, p 82.
24 “Taking the plunge: perceptions of risk-taking associated with formal and informal partner relations” (2005) 17(2) CFLQ 247, 257.