that there was no substance in the point advanced when it is shorn of the various analogies upon which it was based, and therefore these constitute facts and circumstances entitling me to make an order for costs. However, that is not the end of the matter because sec. 117, subsec. (2), requires that if I am of the opinion that in a particular case the circumstances justifying it in doing so I may, subject to the regulations, make such orders for costs as I think just. But when I turn to the regulations I find that reg. 173A, subreg. (1), requires me to take into account, amongst other things, para. (d) the financial circumstances of the party to the proceedings against whom the order is to be made and (e) the availability of Legal Aid to the parties to the proceedings. Being required to take those factors into account and bearing in mind the financial circumstances of the wife as they have been revealed in the evidence and as I have stated them, I am of the view that the financial circumstances are such that it would be unjust for me to make an order against her in these proceedings; and accordingly having regard thereto I decline to make an order for costs sought.

[His Honour then gave directions to permit the intervenor to uplift the memorandum of transfer and made formal orders.]

[¶90-874] In the marriage of ROGERS, K.W. and ROGERS, G.J.
Full Court of the Family Court of Australia at Sydney.
Judgment delivered 17 October 1980.
Full text of judgment below.

Property — Sec. 79 application — Trial judge ordered that wife pay husband one-quarter of value of former matrimonial home and husband transfer to her his interest as joint tenant — Wife's direct contribution to purchase and maintenance of home and household expenses considerably greater than husband's — Husband's contribution as homemaker and parent and support for family for nine years — Appeal to Full Court — Trial judge did not have sufficient regard to sec. 79(2) — Should not have interfered with parties' legal arrangements as to property — Purpose of sec. 79(2) — Result plainly unjust having regard to sec. 79(4) — Trustees for sale to be appointed and house to be sold by auction — Husband and wife to receive one-half of proceeds each — Family Law Act 1975 — sec. 79(2), (4).

This was an appeal by the wife and a cross-appeal by the husband against orders made under sec. 79. The effect of these orders had been that the wife pay the husband one-quarter of the nett value of the former matrimonial home and that, on such payment, the husband transfer his interest as joint tenant to the wife. On appeal, the wife sought the transfer of her husband's interest without payment; the husband sought a declaration that each party was entitled to an equal share in the property and a sale and division of the proceeds.

The husband had no substantial assets other than his interest in the home. The wife had her interest in the home and a number of other substantial assets (including a share in the W.C. Wentworth Settlement and capital distribution from the settlement). The wife's contention meant that she would end up with assets worth some $400,000 and the husband with virtually nothing.

The wife's justification for her contention lay in the financial history of the marriage. The share in the settlement had been a gift from her family and the husband had made no contribution. The evidence established that the wife's direct contribution to the purchase of the house and its maintenance and to the general household expenses was considerably greater than that of the husband. However, the husband had contributed as homemaker and parent and, for some nine years, the husband's earnings had been the substantial source of the family's support.

The Full Court *held:*

(a) The trial judge had not had sufficient regard to sec. 79(2). The purpose of sec. 79(2) is to ensure that the court will not alter the property rights of the parties unless it is satisfied that

cogent considerations of justice require it to do so. Here, considerations which required the court's interference with the legal arrangements which the parties had made as regards to property had not been present. The parties' arrangements had been that the wife had a good income and a sizeable fortune of her own, but that the matrimonial home was their joint asset.

(b) In any event, the result was plainly unjust when regard was had to the relevant factors in sec. 79(4).

(c) The wife's appeal was dismissed and the husband's cross-appeal allowed. The husband should receive half the value of the former matrimonial home. In view of the dispute as to the property's value, trustees for sale should be appointed and the property sold by public auction, with each of the parties having the right to bid.

Before: *Watson* S.J., *Lusink* and *Strauss* JJ.

Watson S.J., Lusink and Strauss JJ.: In this matter there is an appeal by the wife and a cross-appeal by the husband against orders made by *Pawley* S.J. on 15 November 1979.

The substantial debate before us concerned his Honour's orders which were made under sec. 79 of the *Family Law Act*. The effect of these orders was that the wife pay to the husband one-quarter of the nett value of the former matrimonial home at Bellevue Hill in the State of New South Wales and that upon such payment the husband transfer his interest as joint tenant in the property to the wife. The home in question had been valued by one valuer at $145,000, by another at $160,000 and by yet another at $210,000. It was subject to a mortgage of $31,000. His Honour ordered that each party obtain one further valuation and that for the purposes of assessing the payment by the wife to the husband the mean between the two valuations be adopted. In default of payment of the sum so ascertained, the home was to be sold and the nett proceeds divided by paying three-quarters thereof to the wife and one-quarter to the husband.

In the proceedings before *Pawley* S.J. and on this appeal the wife sought the transfer to her of all the husband's interest in this house without any payment therefor. The husband on the other hand sought and seeks a declaration that each party is entitled to an equal share in the property and a sale and division of the proceeds.

The principal ground of the wife's appeal was to the effect that his Honour should have transferred the whole of the husband's interest to the wife having regard to his findings as to the extent of the wife's contributions to the acquisition, maintenance and renovation of the home and the wife's contribution to the general finances of the family and the husband's own living expenses. Another ground of the wife's appeal was to the effect that his Honour should have made a finding of the value of the home having regard to the evidence which the parties put before him. By an amendment granted at the hearing a third ground of appeal was introduced and this ground made complaint that his Honour erred in law in rejecting evidence of the former husband's assaults upon the wife.

The husband's substantial grounds of the cross-appeal amounted in effect to a complaint that having regard to all relevant findings it was not just and equitable to have altered the existing rights of the parties in the property. One of the grounds of cross-appeal was that his Honour erred "in finding that he was not very concerned with the exact value of the house".

At the time of the hearing before *Pawley* S.J. the husband was 44 and the wife was 39 years of age. They had married on 25 November 1960. The two children of the marriage were girls born on 12 October 1961 and 19 January 1965. At the time of the hearing the younger was a schoolgirl living with the wife in the home; the elder had left school and was not living with either of the parties. According to his Honour's findings, the parties separated on 19 July 1974, although they continued to live under the same roof until the wife obtained a non-molestation order on 1 February 1977. However, despite the separation in 1974 the

financial relationships of the parties appear to have continued in much the same vein as previously until the husband left the home in 1977. The husband continued to make the mortgage payments of $346 per month until April 1978 and since then the wife has made the mortgage payments. She had remained in occupation of the property to the exclusion of the husband. The marriage was dissolved consequent upon a decree nisi granted on 18 April 1978.

As his Honour did not make any finding as to the value of the property, all that can be said about it is that it was an asset which at the date of hearing before *Pawley* S.J. had a nett value of between about $114,000 and about $179,000.

The husband had no substantial assets other than his interest in the house and an interest in an insurance policy. This policy was one on the wife's life and its surrender value was about $958 or thereabouts. The husband was in fairly recent employment earning $20,000 gross a year as a company executive. He had been employed during the marriage in the main in the advertising field as an "executive" but his earnings do not seem to have been high. The $20,000 salary which he was earning at the time of the hearing appears to reflect (subject to the changes in salaries and money values which have taken place in the community over the last few years) the standard at which he had been earning for a number of years during the marriage.

In April 1979 the husband married again. His second wife was herself divorced and she had the care of two young children, 6 and 8 respectively, of her first marriage. The husband lived in a house in which the second wife had a half interest, the other half interest being held on trust for the children of her first marriage.

The wife had her interest in the house at Bellevue Hill. Her main asset was a one fourteenth share in the W.C. Wentworth Settlement. The book value of the wife's interest was about $250,000. His Honour commented that "the husband submitted that her interest was greater than that. This may well be so. In any event she has considerable resources in this regard". There had been from time to time capital distributions to her from the settlement. Between 1972 and 1977 these capital distributions amounted to $54,400. In 1978 she received $4,000 and in 1979 $15,000 by way of capital distribution. She was expecting to receive shortly a distribution of capital in excess of $50,000 from the sale of some assets of the settlement. The evidence also showed that she had various insurance policies and furniture and furnishings.

Since about 1969 she has been employed full-time by the W.C. Wentworth Settlement. At the time of the hearing she was in receipt of a gross salary of $22,000 as manager and a director of the settlement. In addition, the settlement paid her entertainment expenses, provided a motor car for her use and paid part of its running expenses and for her home telephone. She was suffering from a degenerative spinal condition, but this condition was not likely to interfere with her earning capacity in the foreseeable future. The children were beneficiaries under the G.N. Wentworth Trust, and according to the wife she had received $4,900 from this trust for the children's maintenance during the last year.

The wife's contention means that she should end up with about $400,000 worth of assets, and the husband with nothing worth mentioning. The justification for this contention lies in the financial history of the parties. In 1964 the wife purchased the one fourteenth share in W.C. Wentworth Settlement from her father. Over the years gifts were made by her father by which the amounts owing to her father were forgiven. It is plain that her interest in the settlement came to her from her family and the husband did not contribute in any way to it.

As regards the house, it was the second one which the parties owned as joint tenants. In August 1961 they purchased as joint tenants a property at Rose Bay for £6,351. It was not disputed that the wife had contributed £2,500 to the purchase. There was some dispute about the extent of the husband's initial contribution to this purchase, about the extent to which the wife assisted in the payment of mortgage instalments and about the cost of certain improvements paid by the wife. The husband claimed that his financial contribution to that house was greater than that of the wife. When the house was sold in

1973 for $68,000, the parties owed $10,000 on a mortgage over it. His Honour's findings as to the extent of the contributions of the parties was as follows:

> "On the whole of the evidence I am satisfied that both parties contributed to the purchase of the Rose Bay home and that the wife's contribution was a substantial one."

We note here that according to some of the wife's evidence the personal relationships between the parties had been strained since 1967. Nevertheless, upon the sale of the Rose Bay premises there was purchased in the joint names of the parties the property at Bellevue Hill for $85,000. That price was paid partly with the proceeds of the sale of the Rose Bay property and partly with a mortgage of $35,000 from the Mutual Life and Citizens Assurance Company Ltd. At the time of the hearing $31,000 remained owing under this mortgage. These mortgage instalments were made by the husband out of a joint account in the names of the parties until April 1978. Since May 1978 the wife, who had the occupancy of the property, has paid them.

After the purchase, the wife paid $13,000 for renovations for the house, and the husband assisted with the physical work of these renovations. His Honour also accepted the wife's evidence that she spent other sums upon maintaining and improving the house from her own funds. Throughout the marriage, in addition to the wife's private account, a joint account was conducted by the parties. Rates and taxes were usually paid out of this joint account but from time to time rates and taxes were met out of the wife's private account. His Honour also accepted the wife's evidence that she contributed far more than the husband to the general finances of the family and that the husband operated upon the joint account not only for the purpose of making the mortgage repayments, but also for his own living expenses.

However, it was common ground that the joint account was used not only for mortgage payments and rates, but for general living expenses of the husband and the wife. The husband claimed, and this was not contradicted, that during cohabitation he had paid all his earnings from his employment into this joint account. Furthermore Exhibit "R" to which his Honour referred in the judgment, makes it clear that each of the parties was able to and did draw upon the joint account. The analysis of this exhibit shows that between December 1972 and January 1977 cheques drawn by the wife amounted to a total of $14,901.35 and cheques drawn by the husband to $25,868.78, and that a further $16,647.42 was paid upon bank orders. An analysis was produced which showed that the wife expended out of her private account $93,345 from January 1973 to June 1977. As the husband has been criticised for drawing substantial amounts of cash from the joint account (this being in substance the only source from which he was able to draw cash), it should also be noted that the wife claimed to have drawn $11,982 in cash over this period. His Honour accepted evidence which showed that the husband's earnings were not the only source of funds for the joint account, but that the wife made substantial deposits into it, and that it was necessary for her to do this from time to time. The wife claimed in her affidavit sworn on 22 August 1977 that between 1 January 1973 and June 1977 the husband contributed towards the total expenditure of the household $37,097, she contributed $88,346, and that there was a further $3,523 paid into and expended through the joint account the source of which could not be identified.

In substance, the wife's evidence was accepted by his Honour who found that the wife's direct contributions to the purchase of the house, its renovation, maintenance and repair and to the general household expenses was considerably greater than those of the husband.

His Honour found in the husband's favour that by reason of the wife's spinal condition he did make an appreciable contribution as a homemaker and parent because it was necessary for him to do washing and ironing and cook meals from time to time. His Honour also found that for a time in 1975 when the husband was unemployed, he assisted the wife in her business venture in connection with rock and roll performances.

As regards the early years of the marriage, the wife's evidence was that from the time of the marriage until late June 1961 she worked on a full-time basis; that she did from time to time some part-time work after the birth of

the elder girl until some time before the birth of the younger girl on 19 January 1965 and that from mid 1968 she worked on a full-time basis first as a geologist and from about the middle of 1968 in connection with the W.C. Wentworth Settlement. It is plain that between 1961 and 1968 the husband's earnings were the substantial source of the family's support. Then, when the wife received a substantial income and substantial funds, the parties lived at a standard which they could not have afforded if they had depended on the husband's earnings alone.

His Honour concluded:

> "Having given consideration, therefore, to the contributions direct and indirect, made by both the husband and the wife to the acquisition conservation and improvement of the property, and having given consideration to the contributions they made to the family both by reason of tasks carried out and money supplied, bearing in mind the resources and present finances that they have, taking into account other matters which I am bound to do by reason of statute, I am satisfied that it would be just and equitable in this case were the husband to receive 25% of the nett value of the former matrimonial home."

There are a number of difficulties implicit in the passage quoted. It is plain enough that if the financial history and position of the husband and the wife had been reversed, and if it had been the husband who was in the wife's financial position, no Court would be likely to have made an order which would have deprived the wife of half her legal and equitable interest in the home. After 18 years of marriage, a wife who had made a contribution similar to that of the husband, could have looked forward to an appreciable portion of the husband's whole fortune, notwithstanding that the bulk of it might have come to him through gifts from his family. The passage does not make it clear what the other matters were which his Honour took into account.

His Honour did not refer to sec. 79(2) of the Act which is in the following terms:

> "The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order."

Strauss J. said about sec. 79(2) in *Ferguson and Ferguson* (1978) FLC ¶90-500 at p. 77,615:

> "It seems to me, that the main purpose of sec. 79(2) is to ensure that the Court will not alter the property rights of the parties, unless it is satisfied that cogent considerations of justice require it to do so, and that if the Court decides that it is requisite to make any order under the section, the Court must be satisfied that the alterations so ordered, will go no further than the justice of the matter demands. Whether it is just and equitable in all the circumstances to make any and what order, involves a consideration of the matters which the Court is required to take into account under sec. 79(4)(a) to (e), because that subsection expressly enumerates the kind of matters which the legislature considered relevant in the determination of a claim for an alteration of interests in property. All these matters are concerned with considerations having financial or economic significance."

In our view, *Pawley* S.J. could not have had sufficient regard to this subsection when he came to the conclusion that one-half of the husband's interest in the home should be taken from him. There were not present the cogent considerations of justice which required the Court's interference with the legal arrangements which the parties themselves had made with regard to their property. These arrangements were that the wife had a good income and a sizeable fortune of her own, but that the home in which the parties lived and to which they both contributed was their joint asset. The arrangement for joint ownership was made when the parties first purchased a home in 1961, and it was repeated in 1973 when the home in Bellevue Hill was purchased.

The decision in question here is made in the exercise of a discretion conferred upon his Honour. This Court should not substitute its own opinion for that of the trial judge unless it is convinced that an error has been made in the exercise of his Honour's discretion (*House v. R.* (1936) 55 C.L.R. 499 at pp. 504-505; *Gronow v. Gronow* (1979) FLC ¶90-716 at p. 78,857; (1979) 54 A.L.J.R. 243 at p. 251).

We think his Honour must have failed to have regard to sec. 79(2) when he reached the

result he did. Even if we were wrong in this respect, the result is plainly unjust when regard is had to all the relevant factors in sec. 79(4), which are not only concerned with financial contributions to a particular asset, but with the whole of the financial and economic history and foreseeable future of the parties. If proper regard had been had to all these matters, then there would have been no reason to disturb the existing position which was what was prima facie just after a reasonably long marriage, namely that the parties had an equal entitlement to what had been their home.

Accordingly, it is our view that the husband should retain his half interest in the home and that orders should be made which will ensure that he is paid half the nett value of the home.

It was not suggested that the alleged assaults had any lasting ill-effects or that they had impaired the wife's earning capacity or that they had involved her in expenditure. Consequently, we agree with his Honour that the evidence of the alleged assaults was irrelevant to the issues which had to be decided (see *Ferguson and Ferguson* (1978) FLC ¶90-500).

There remains the complaint that his Honour should have resolved what the value of the property was. We are inclined to agree that as the issue was submitted to his Honour for determination, he should have resolved it. However, in the events which have happened, it is more likely than not that the value will now be different from that which it would have been when *Pawley* S.J. was asked to determine the matter. Counsel submitted that the best and most reliable way of resolving the question of value was not to ask two different valuers to submit a valuation and fix a mean, but rather to appoint trustees for sale and to divide the proceeds of the sale. In our opinion the property should be sold by public auction and each of the parties should have the right to bid at an auction. Such a course will no doubt involve the parties in some expense, but having regard to the large discrepancy between the valuations, the cost of further valuations and the possibility of arguments about them, a sale seems to be the best way of resolving the matter without undue delay.

Accordingly, we dismiss the wife's appeal. We allow the husband's cross-appeal and order that there be a sale of the property at Bellevue Hill by public auction within three months and that the nett proceeds of sale be divided equally between the parties. We grant the parties liberty to apply to a judge in the Sydney Registry for directions as to the appointment of trustees for the sale of the property and as to the other conditions of the sale.

[¶90-875] In the marriage of BROWN, L.F. and BROWN, W.J.
Full Court of the Family Court of Australia at Sydney.
Judgment delivered 11 December 1979.
Full text of judgment below.

Custody — Parties separated — Child living with wife in caravans — Uncertainty as to future prospects of child should child remain with wife — Overall welfare of the child is the important factor, not the "short term view" — Court should usually adopt the course least likely to expose child to risk — Custody awarded to husband.

This was an appeal from a decision of the trial Judge that the wife have the care and control of the female child of the marriage. Since the parties had separated, the child (approximately 2½ years old) had been mainly living with the wife in caravans. There had been evidence before the trial Judge that there was uncertainty as to the future prospects of the child, both materially and emotionally, should the child remain with the wife. The evidence also suggested that the husband was capable of attending satisfactorily to the care of the child.

The trial Judge had said that it was difficult to assess the long term effects on the child of being in the custody of one parent or the other. Therefore, the "short term view" must play an important part and the child should remain with the wife, who had had the care of the child for most of the time.