

3. The Continuing Importance of Economic Factors

*I see you are open for business so let's to church*¹

Introduction

In the previous chapter, I analysed the legal discourse of marriage in relation to what has been one of its most fundamental defining aspects — sexual intercourse — and argued that there has been a very significant change in the discourse of marriage, with love beginning to be insinuated. This chapter will turn to the equally important association of marriage with economic and financial considerations. Marriage has traditionally been connected to wealth, property and economic welfare, and has represented the economic union of two parties. This chapter asks what role love plays in the law when we consider it alongside the economic, commercial and financial aspects of marriage, and shows that, despite the acknowledgement of romantic love in this discourse, traditional meanings remain strong.

Despite the many obvious economic, financial and business aspects of marriage, the law is careful to retain a distinction between the market place and the home. The economic exchanges that occur between intimates can neither be completely commercialised nor completely ignored. This chapter examines the case of *Garcia v the National Australia Bank*, which is much discussed in Australian legal literature. This case represents the struggle that the law can face in this context. The case reaffirmed a principle, established in *Yerkey v Jones*,² that a married woman who had signed a guarantee for her husband's business and who did not know its full effect at the time, could avoid the guarantee. In reaffirming the principle, the majority of the full Court of the High Court of Australia rejected calls to remove an 'archaic' and 'discriminatory' principle in favour of what they saw as protecting a married woman who found herself in a position of disadvantage because she had placed 'trust and confidence' in her husband.

The case received much attention for the ways in which it changed banking practices, extended the principle of unconscionability in Australian law, and affirmed the role of Equity in commercial law, as well as the extent to which it replicated an outdated mode of gender relations in a modern Australian

¹ John Madden, *Shakespeare in Love* (Universal Studios, 2004).

² *Yerkey v Jones* (1939) 63 CLR 649.

marriage.³ It is this final point that makes this case central to the analysis in this book. Discussion here will focus on the case's representation of marriage, and will question the role it affords to love within marriage. While the case does not mention love specifically, I will argue that love forms part of the meaning of marriage via the elements of trust and confidence which were considered crucial to marriage by the Court in the case.

The rhetoric of modern romantic love and marriage, as discussed in chapter one, is rarely associated with practical considerations such as compatibility due to economic circumstances, class and education. Indeed, as previously discussed, romantic love is conceived as a liberation from such considerations.⁴ The extent to which this represents reality is debatable.⁵ Nevertheless, the rhetoric is that love is above all such considerations. The case of *Garcia* represents more than a recognition that marriage is of economic consequence, it also represents an example of how economic and business dealings become entangled with emotional issues in a marriage; how incompatible they can be with each other, and what disadvantage they can cause. In this way, the case recognises both of the faces of love that I identified earlier: the liberating and the oppressive.

The Economic Discourse of Marriage and the Law

Marriage needs to be understood within an economic paradigm. Stone⁶ argues that the legal requirement that marriage should be registered and performed publicly was initially motivated by a desire by wealthy families to prevent their children from making unsuitable matches with members of the lower classes,

3 Among the 60 or more articles written on *Garcia*, see G Williams, 'Equitable Principles for the Protection of Vulnerable Guarantors: Is the Principle in *Yerkey v Jones* Still Needed?' (1994) 8 *Journal of Contract Law* 67–83; B Fehlberg, 'The Husband, the Bank, the Wife and her Signature' (1994) 57 *Modern Law Review* 467–75 and 'The Husband, the Bank, the Wife and her Signature the Sequel' (1996) 59 *Modern Law Review* 675–694; B Collier, 'The Rule in *Yerkey v Jones*: Fundamental Principles and Fundamental Problems' (1996) 4 *Australian Property Law Journal* 181–222; Su-King Hii, 'From *Yerkey* to *Garcia*: 60 years on and Still as Confused as Ever!' (1997) 7 *Australian Property Law Journal* 47–75; K Green & H Lim, 'Weaving Along the Borders: Public and Private, Women and Banks' in S Scott-Hunt & H Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish, London 2001) 85–109; E Stone, 'Infants, Lunatics and Married Women: Equitable Protection in *Garcia v National Australia Bank*' (1999) 62 *Modern Law Review* 604–613; R Haigh & S Hepburn, 'Bank Manager Always Rings Twice: Stereotyping in Equity After *Garcia*' (2000) 26 *Monash University Law Review* 275–311; K Dunn, 'Yakking Giants': Equality Discourse in the High Court' (2000) 24 *Melbourne University Law Review* 427–461; J Pascoe, 'Women Who Guarantee Company Debts: Wife or Director?' (2003) 8 *Deakin Law Review* 13–48; T Wright, 'The Special Wives' Equity and the Struggle for Women's Equality' (2006) 31(2) *Alternative Law Journal* 66–69, 87.

4 See discussion on the meaning of love in the introduction.

5 See Illouz, *Consuming the Romantic Utopia: Love and the Cultural Contradictions of Capitalism* (University of California Press, Berkeley 1997); Bix, 'Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage' (1998–1999) 40 *William & Mary Law Review* 145–208.

6 See L Stone, *Uncertain Unions: Marriage in England, 1660–1753* (Oxford University Press, Oxford 1992).

thus diminishing the economic value of the family's accumulated wealth.⁷ Economic considerations remain a large part of making marriage decisions. Bix argues, that despite the rhetoric, economic security is still a factor in people's decision of who to marry, even if it is framed in terms of who to fall in love with rather than who to marry. He suggests that whether acknowledged or not, most marriages have elements of both love and economic utility: 'that a partner can offer security may be part of his or her romantic allure'.⁸

Eva Illouz makes a similar argument, drawing from empirical studies in America. She shows that marriage is still considered to be a strategy of investment, embodying issues of economics and class:⁹

Under capitalism, social relations are characterized by class stratification and individual competition; marriage bonds are formed in this context and sustain rather than disrupt it ... Marriage is often still a search for a partner with the 'best available assets', and the affectionate marriage has paradoxically enough instituted a 'market point of view' in romantic relationships.¹⁰

There are many obvious examples, both historical and current, where the courts are forced to confront the economic value of marriage. In the past, courts placed a monetary value on marriage in cases of loss of consortium and breach of promise to marry.¹¹ Furthermore, the economic value of marriage is implied in many other less visible ways; for example, in the 'marriage discount' used to calculate damages in tort cases based on the chance of a woman remarrying.¹² The increasing recognition of prenuptial agreements is a further example of the 'economic thinking' that takes place between prospective marriage partners. Yet, despite these many examples, the dominant approach in law is to retain a distinction between the market and the home. The most illustrative example of this is the contract law presumption of intention against the legality of agreements arising in the domestic social sphere, which is still quoted with authority almost 100 years after it received its first judicial utterance. The case of *Balfour v Balfour*¹³ established a presumption that promises made between husbands and wives, even when they pertain to the economic arrangements between them, have no legal weight as they are promises made only in consideration of love. The leading judgement of Lord Justice Aitken relies on the arguments that a contract cannot exist between a husband and a wife because there is no

7 Stone, *Uncertain Unions* 32–34. See also Coontz, *Marriage: A History* 177–178.

8 Bix, 'Bargaining in the Shadow of Love' 162.

9 See P Johnson & S Lawler, 'Coming Home to Love and Class' *Sociological Research Online* (2005) 10(3) www.socresonline.org.uk/10/3/johnson.html accessed 16/10/2009.

10 Illouz, *Consuming the Romantic Utopia* 197.

11 M Thornton has looked at these issues in 'Loss of Consortium'. See also M Thornton, 'Historicising Citizenship: Remembering Broken Promises' (1995–1996) 20 *Melbourne University Law Review* 1072–1086.

12 See M Thornton, 'Rapunzel and the Lure of Equal Citizenship' (2004) 8 *Law Text Culture* 231–262.

13 *Balfour v Balfour* [1919] 2 KB 571.

intention between the parties to be legally bound.¹⁴ He argued that it was not within the parties' contemplation to have their agreement litigated because of the nature of their relationship. He said that the common law 'does not regulate the form of agreements between spouses. Their promises are not sealed with seals and wax. The consideration that really obtains for them is that natural love and affection which counts so little in these cold courts.'¹⁵ This distinction is justified on the ground that behaviour in the home is motivated by different values than behaviour in the market. The philosophical underpinnings of commercial activity, and therefore commercial law, can be found in a number of principles that emphasise self-interest. Peason and Fisher, for example, list the following as the principles of commercial law: party autonomy, predictability, flexibility, good faith, the encouragement of self-help, the facilitation of security interests, and the protection of vested interests. The protection of vulnerable parties is also listed, but as an equitable principle rather than a common law one.¹⁶ These are in turn visible in more specific guiding legal principles such as the 'freedom to contract' principle that assumes that contracting individuals are free and rational, and motivated only by a wish to maximise their interest. Another is the principle '*caveat emptor*' (buyer beware), which imposes upon buyers a responsibility to look after their own interest. Another is the principle that the law will not interfere in cases of mistake, generally letting the loss lay where it falls.¹⁷

All of these principles are generally considered to be out of place in an intimate family relationship. Frances Olsen, for example, argues that marriage and family are founded upon an ethic of altruism. 'Neither husband nor wife are expected to pursue selfish interests over the other'.¹⁸ Sharing and self-sacrifice are considered appropriate behaviour. That this is, in reality, what happens has been well documented by Belinda Fehlberg, who found that, overwhelmingly, women in family businesses saw themselves as playing a support role, and that the justification for that role came from the love and affection they felt for their husbands. A typical articulation of this was from one subject in the Fehlberg study, Ms Fenwick, who said 'when you love someone, you just do what they

14 Ironically, at the same time as arguing that married couples never contemplate litigation to enforce agreements between them, the second reason for denying the existence of a contract is the floodgates argument. Aitken LJ argued that without such a presumption the number of small courts in the country would have to be 'multiplied by one hundredfold', thus appearing to contradict his first argument. The final argument Aitken relies on for the presumption is the old private sphere chestnut. As he famously stated, 'each house is a domain into which the King's writ does not seek to run, into which his officers do not seek to be admitted'. *Balfour v Balfour* 579.

15 *Balfour v Balfour* [1919] 2 KB 579 (Aitken LJ).

16 G Pearson and S Fisher, *Commercial Law: Commentary and Material* (LawBook Company, NSW 2009) 7–14.

17 See *non est factum* case *Gallie v Lee* [1971] AC 1004 and unilateral mistake case *Taylor v Johnson* (1983) 151 CLR 422.

18 F Olsen, 'The Family and the Market a Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 131.

ask you to do',¹⁹ adding that 'loyalty is the main thing, isn't it? ... it would be totally disloyal not to [sign]'.²⁰ Other wives in the study were motivated by a desire to sustain the family, avoid conflict, and demonstrate loyalty and trust.²¹ For some women this requirement was so strong that they did not see themselves as having any choice but to defer to their husband's requests. Mrs Elliot, for example, said that 'you have a choice whether you're going to stay married or not, and that's really what you're down to, isn't it?'²²

There is nothing problematic *per se* in a discourse of economic union and altruistic behaviour, were it not for the fact that it is inextricably linked to traditional gender roles patriarchy and unequal power, and thus ends up disadvantaging women. The fact of the matter is that the dominant marriage model places women at home and men at work.²³ The work that they perform is seen as part of the bargain of love and has no political and economic value. Men's work, on the other hand, might just as equally be done for love but it has the added value of bestowing upon the giver economic and political value. As Thornton puts it, 'nurturing and housework have conventionally been perceived as a natural part of cohabitation and the conceptualisation of what women do in the home is deemed to be of no value in economic terms'.²⁴ To redress this imbalance, feminists have been arguing for a re-evaluation of the 'caring' work that women do,²⁵ including agitating for placing a dollar value on all of the work done in the 'home' mostly by women, including placing a value on sexual intercourse.²⁶

This creates some interesting reflections for the approach law should take in acknowledging and regulating the economic and the emotional aspects of

19 Fehlbeg, *Sexually Transmitted Debt* 148.

20 Fehlbeg, *Sexually Transmitted Debt* 182.

21 Fehlbeg, *Sexually Transmitted Debt* 174, 187.

22 Fehlbeg, *Sexually Transmitted Debt* 182.

23 This model is still mostly true. Even if women participate in the workforce they are still more likely than men to be part-time workers and are more likely than men to spend periods of time away from work while at home caring for children. According to Australian Bureau of Statistics figures published on a NSW government website, in 1966 women made up 31 per cent of the NSW workforce, while in 1995 they constituted just under 43 per cent of the workforce. (ABS Catalogue No. 4107.1) In August 1995, 52.1 per cent of all women in NSW aged over 15 years were participating in the labour force (the national female average was 54 per cent). This was significantly lower than the equivalent male participation rate, which was 72.7 per cent (ABS Catalogue No. 6201.1). Women's levels of participation in the labour market vary during their working lives. The participation rate of married women is lower during the childbearing age range of 25–34 years (ABS Catalogue No. 4107.1). In 1995, just below 40 per cent of employed women in NSW worked on a part-time basis. Women made up about 75 per cent of all part-time employees in NSW (ABS Catalogue No 6201.1). http://www.industrialrelations.nsw.gov.au/About_NSW_IR/Issues_and_policy/Archive/Pay_equity_inquiry/Womens_pay_and_employment_patterns.html accessed 27/07/10.

24 Thornton, 'Intention to Contract Public Act or Private Sentiment' in N Naffine R Owens J Williams (eds), *Intention in Law and Philosophy* (Ashgate, Aldershot 2001) 231.

25 See C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, Cambridge Massachusetts 1982); N Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (New York Teachers College Press, Berkely 1984); M A Fineman, *The Neutered Mother: The Sexual Family and Other Twentieth Century Tragedies* (Routledge, New York 1995).

26 See L R Hirshman & J E Larson, *Hard Bargains: The Politics of Sex* (Oxford University Press, New York 1999).

intimacy in general, and marriage specifically.²⁷ Elaine Hasday points to two traditions within the legal system, the first and more prominent is what she terms an anti-commodification stance, which deems that economic exchange between intimates is inappropriate and therefore should not be enforced. This view that is in keeping with the contract law presumptions against contracts entered into between intimates. The second position is termed a 'pro-market' position, which sees the super-imposition of an economic model upon an intimate relationship as a way for law to achieve a more equal relationship between people. Hasday argues that both of these positions underestimate the extent to which law already regulates economic exchanges. In marriage, while careful not to reduce the institution to a corporation, legal precedent tends to recognise agreements that fulfil certain characteristics: those that recognise the joint interests of husband and wife rather than their individual interests, and those that do not take a direct specific exchange model.²⁸ Hasday claims that in this way the law recognises that intimate relationships are neither wholly spontaneous nor completely free of bargaining.²⁹ An example of the law's task in this area is the Case of *Garcia*.

The Case of *Garcia*

Jean Garcia was married to Fabio Garcia in 1970. They had two children. Jean Garcia had a diploma in physiotherapy and ran her own practice. Fabio Garcia had a Master of Business Administration from Harvard University and during their marriage ran a range of companies involved in foreign exchange and gold import and export. By the time the case came to Court, the Garcias had divorced. The dispute involved some guarantees and a mortgage over the family home that Jean Garcia had signed with the National Bank of Australia to guarantee some loans for her husband's company, 'Citizen Gold'.

Economic Relationship

Jean and Fabio each conducted their own businesses. While it appears that Fabio had little to do with Jean's physiotherapy practice, Jean was named as a second director in some of Fabio's companies to fulfil formal company law requirements,³⁰ and was therefore required to have a formal involvement in

27 See Viviana Zelizer, 'The Purchase of Intimacy' (2000) 25 *Law and Social Inquiry* 817–848; 'Payments and Social Ties' (1996) 11 *Sociological Forum* 481–495.

28 J E Hasday, 'Intimacy and Economic Exchange' (2005) 119 *Harvard Law Review* 491–530.

29 Hasday, 'Intimacy and Economic Exchange' 459.

30 Corporation laws in the 1990s required companies to have more than one director, in fact, two or three were required depending on the type of company in question. Many small family companies fulfilled this legal requirement by naming a spouse as a director. Corporations Law 1990 s221 (1). This was reformed in the First

Fabio's affairs, this involvement consisting primarily of signing documents, which she mostly did without discussion. In fact, evidence showed that she was so little aware of what she was signing that her signature was forged from time to time, with her knowledge, by Fabio.

In 1984, upon the liquidation of one of Fabio's companies, Jean appeared before the Registrar of the Supreme Court of NSW, who accepted that Jean had little knowledge of, or actual role, in the affairs of her husband's company and cautioned her against signing documents without knowing what they were about in the future. Subsequently, Jean began to take more notice but would still mostly follow her husbands' requests to simply sign documents. Often Fabio asked her to sign documents when she was in a hurry rushing out of the door to meet an appointment with a client and making it difficult for her to make necessary inquiries. On the occasions that Jean tried to ask questions about Fabio's business matters, he would reply that she understood little about how business and markets worked and that she should leave business decisions to him.

Earnings from Fabio's businesses fluctuated. The nature of the business meant that the bank account could be in credit by six figures one day and in debit by a similar amount shortly after. When business was going well, as in 1985, Fabio would contribute more to the family income and expenditure, paying school fees and depositing money into their joint account, but this was not a constant state of affairs. In short, the evidence presented showed that Fabio's companies were the total creation, and in his total control. Fabio and Jean owned a family home. This home was built by the couple on some land that Jean bought in 1971 with the help of her father. Jean transferred half of the interest in the land to Fabio in order to have his name on the title for borrowing purposes, but he paid nothing for this interest. They jointly borrowed the money to build the house upon that land.

Emotional Relationship

The emotional relationship between Fabio and Jean was not close. He would often come home late and eat his dinner while watching television. Fabio seemed moody and was often unkind to Jean, suggesting that she was unsophisticated and ignorant of business affairs. Evidence showed that Fabio had been having an affair for a number of years and he eventually left Jean to live with his lover.

The relationship between husband and wife had been quite strained immediately prior to the signing of the 1987 guarantee that this case hinged upon. Jean had been away on an overseas trip. Upon her return, her husband had been in a rage and hardly spoke to her. Then, quite suddenly, Fabio began to be more

attentive, coming home early and taking his wife and children out to dinner. On one of these occasions he told her he wanted to increase the overdraft to his business account. She indicated that she was nervous about this course of action but he assured her that there was nothing to worry about because, if the money was not there then the gold would be, and that there was no risk involved. He 'reassured' her by telling her '[y]ou are so conservative just like the rest of your family. One of these days I won't be around and you can be boring all by yourself.'³¹ When Jean agreed to go to the bank and sign the necessary documents, Fabio told her to do it that week.

The Legal Argument

In *Garcia v National Australia Bank Ltd*,³² Justice Young found that Mrs Garcia could avoid her financial responsibilities for the guarantee over her husband's business by relying on a principle which has been termed the 'special equity of wives'. This principle is found in the 1939 High Court case of *Yerkey v Jones*.³³ Dixon J's judgement in this case is taken to be the definitive statement of this rule. Dixon J said that while no presumption of undue influence emerges between husband and wife, there is an equitable presumption of an invalidating tendency where a wife bestows her separate property upon a third party for the benefit of her husband. The rule was stated thus:

If a married woman's consent to become a surety for her husband's debt is procured by the husband and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing directly with her personally, she has a prima facie right to have it set aside.³⁴

Yerkey v Jones actually dealt with two circumstances involving a wife as surety for a husband, the first being where there is actual undue influence by a husband over a wife, and the second where there is a failure to explain adequately and accurately the suretyship transaction which the husband seeks to have the wife enter for the immediate economic benefit of the husband.

Justice Young said that he did not see why the second circumstance in the *Yerkey v Jones* principle did not apply to Mrs Garcia. Mrs Garcia presented herself as an intelligent woman but she did not take an active part in her husband's business,

31 *Garcia v National Australia Bank Ltd* BC 9301944 Supreme Court of NSW Equity Division 1993, 26 (Young J).

32 *Garcia v National Australia Bank Ltd* BC 9301944 Supreme Court of NSW Equity Division 1993.

33 *Yerkey v Jones* (1939) 63 CLR 649 (Dixon J).

34 *Yerkey v Jones* (1939) 63 CLR 683 (Dixon J).

trusting Mr Garcia to make the necessary decisions. For Justice Young, there was nothing unusual in the fact that Mrs Garcia trusted her husband and left business decisions to him:

Mrs Garcia presented herself as a capable and presentable professional. What she said was in general inherently believable. Despite women's liberation, there are still in the community a large number of women who, especially when their husband is a Master of Business Administration from Harvard and their talents lie in another field, still do trust their husbands to carry out the business from which the family will receive benefit in the way in which the husband thinks best. Furthermore they will act as directors and sign pieces of paper on request ... the general picture of the relationship between FBG and the plaintiff was one where she did trust him to organize business, she did in general what he wanted her to do.³⁵

This finding was successfully appealed in *National Australia Bank v Garcia*³⁶ where the Court said that, while in the past it might have been appropriate to infer or accept that a married woman could not form a sound judgement of a business transaction or that she would be unduly influenced by her husband, this inference could not be made in Australia in the late 1990s. Mahoney P said that:

[I]n the past, the matrimonial relationship and the experience of married women may have been such that it was proper to infer such matters as facts or even to accept that in principle such was the case. To infer such matters now would so often be contrary to experience that it is wrong to accept them to be so, in principle or as a presumption of fact.³⁷

Sheller JA quoted with approval a statement made in 1985 by Justice Rogers, over 10 years earlier, which described the decision in *Yerkey v Jones* as not only out dated but as insulting to married women.³⁸ In *European Asian of Australia Limited v Kurland* Justice Rogers had criticised *Yerkey v Jones*:

I feel compelled to say that in the year 1985 it seems anachronistic to be told that being a female and a wife is, by itself, a sufficient qualification

35 *Garcia v National Australia Bank Ltd* BC 9301944 Supreme Court of NSW Equity Division 1993, 22 (Young J).

36 *National Australia Bank v Garcia* [1996] NSWSC 253 (Mahoney P) <http://www.austlii.edu.au/au/cases/nsw/NSWSC/1996/253.html> accessed 1/09/2008.

37 *National Australia Bank v Garcia* [1996] NSWSC 253 (Mahoney P) <http://www.austlii.edu.au/au/cases/nsw/NSWSC/1996/253.html> accessed 1/09/2008.

38 *National Australia Bank v Garcia* [1996] NSWSC 253 (Sheller JA) <http://www.austlii.edu.au/au/cases/nsw/NSWSC/1996/253.html> accessed 1/09/2008.

to enrol in the class of persons suffering a special disadvantage ... that being a female spouse should place a person shoulder to shoulder with the sick, the ignorant and the impaired is not to be tolerated.³⁹

For Sheller JA this was even truer in 1996 than it had been in 1985.

The two decisions used different approaches. The focus for Mahoney P, Sheller and Meagher JJA, was on Mrs Garcia's capabilities to form sound judgement in her husband's business, whereas for Justice Young the focus had been on whether she was justified in not taking an interest in her husband's business affairs. This is an important distinction that has often been overlooked in commentaries on this case and I will return to the point later in this chapter.

The decision was successfully appealed in the High Court,⁴⁰ where the majority upheld *Yerkey v Jones* and successfully applied it to Mrs Garcia. The majority did not accept that *Yerkey v Jones* no longer had any application, rather they argued that it formed part of general equitable principles which have as much application in contemporary Australia as in the 1930s. They argued that while much has changed in Australian society particularly the role of women both in marriage and in general, 'some things remain unchanged'. The majority still thought there are 'a significant number of women in Australia in relationships which are, for many and varied reasons, marked by disparities of economic and other power between the parties'.⁴¹

The first point made by the High Court majority was that, despite the many changes to the position of married women, protection was still needed, as many married women were still believed to be in a vulnerable economic position. However, the majority argued that this vulnerability does not stem from women being inferior to men, or from marriage being a disadvantage, but rather because a marriage relationship is based upon trust and confidence which implies that each partner to the marriage leaves the other to make decisions without necessarily needing to discuss them.

The second major point made by the majority was that the vulnerability in which married women find themselves stems from the assumption that, once married, some women will leave most if not all business decisions to their husbands because they trust them and have confidence in them to do it well:

[T]he marriage relationship is such that one, often the woman, may well leave many, perhaps all, business judgements to the other spouse. In that kind of relationship, business decisions may be made with little consultation between the parties and with the most abbreviated

39 *European Asian of Australia Limited v Kurland* (1985) 8 NSWLR 200 (Rogers J).

40 *Garcia v National Australia Bank Ltd* [1998] CLR 395.

41 *Garcia v National Australia Bank* [1998] CLR 403–404 (Gaudron, McHugh & Hayne JJ).

explanations of their purport or effect. Sometimes with not the slightest hint of bad faith, the explanation of a particular transaction being given by one to the other will be imperfect and incomplete, if not simply wrong. That that is so is not always attributable to the intended deception, to any imbalance of power between the parties, or, even, the vulnerability of one to exploitation because of emotional involvement. It is, at its core, often a reflection of no more or less than the trust and confidence each has in the other.⁴²

In this statement, the majority of the Court made trust and confidence central to the relationship of marriage.

Justice Kirby dissented from the view of the majority.⁴³ While he favoured protection for vulnerable people in a disadvantageous transaction, he did not support this protection as formulated by *Yerkey v Jones* because it targeted married women and, as such, he saw it as ‘anachronistic’, ‘discriminatory and outmoded’:

[W]hy should undergoing the ceremony of marriage make only a female partner to the relationship more needful of protection from equity than an unmarried female partner? ... to select marriage as a criterion of vulnerability also appears inappropriate at this stage of the evolution of personal relationships in this country. Rather than choose the fact of marriage and sex of one party to it as objective indication of vulnerability for legal purposes, it would seem more rational to look at all of the facts of the relationship between the surety and the borrower. So long as married women, as such, are treated as necessarily vulnerable, whatever the facts of their relationships, the focus of the law will remain upon a consideration which, in most cases, is simply irrelevant.⁴⁴

He went on to say that, while the *Yerkey* principle provides protection to vulnerable people, it is expressed in a way that is unacceptable in contemporary Australia.⁴⁵

Justice Kirby asked why married women should need the protection of the law more than anyone else. Why should marriage be seen as a disadvantage for women? What the majority found, however, was that it may well be that the principle applied to all people in publicly declared relationships, but they chose

42 *Garcia v National Australia Bank* [1998] CLR 404 (Gaudron, McHugh & Hayne JJ).

43 This was not surprising given that he had been highly critical of the *Yerkey v Jones* decision when he was on the NSW Court of Appeal. See, for example, *Warburton v Whitely* (1989) 5 BPR 97388.

44 *Garcia v National Australia Bank* [1998] CLR 425 (Kirby J).

45 *Garcia v National Australia Bank* [1998] CLR 428 (Kirby J). Many commentators had made the same comment. Su-King Hii, ‘From Yerkey to Garcia: 60 Years On and Still as Confused as Ever!’; G Williams, ‘Equitable Principles for the Protection of Vulnerable Guarantors: Is the Principle in *Yerkey v Jones* Still Needed?’; B Collier, ‘The Rule in *Yerkey v Jones*: Fundamental Principles and Fundamental Problems’.

to avoid laying down any principle of law which may incorporate them. Instead they retained the gender and marriage specific principle as outlined in *Yerkey v Jones*:

It may be that the principles applied in *Yerkey v Jones* will find application to other relationships more common now than was the case in 1939 — to long term and publicly declared relationships short of marriage between members of the same or opposite sex — but that is not a question that falls for decision in this case. It may be that those principles will find application where the husband acts as a surety for the wife but again that is not a problem that falls for decision here.⁴⁶

Subsequent application of *Garcia* has not successfully extended the principle to non-married women. In *Liu v Adamson*⁴⁷ Macready M argued that *Garcia* did apply to a de facto wife if the creditor was aware of the relationship. In that case, however, the de facto wife failed to show that she did not gain a benefit from the guarantee. There are also a number of cases where the possibility of a husband using the *Garcia* defence has been discussed,⁴⁸ but to date no actual case with such facts has arisen for determination.

Justice Kirby favoured a principle of protection that was not specific to wives or women only. He saw this as being possible via the adoption of a principle based on the UK case of *Barclays Bank Plc v O'Brien*.⁴⁹ Justice Kirby's proposed approach was to rely on a principle which focussed on wrong doing by the principle debtor in the form of undue influence or misrepresentation, and on an approach which focussed on reasonable steps being taken by the credit provider to ensure that wrongdoing had not occurred. The merit of Justice Kirby's approach is threefold: firstly, it is expressed in non-discriminatory terms; secondly, it addresses the real causes of vulnerability; and thirdly, it recognises the credit provider's power to insist on guarantors seeking independent legal advice.⁵⁰

Another aspect of the *O'Brien* approach that appealed to Justice Kirby was that it retains the economic usability of the family home in business affairs. Kirby J wanted to ensure that the law did not develop in such a way as to render the family home economically sterile. This view was also expressed by Justice Callinan. Both judges quoted with approval the statement of this principle in *O'Brien*:

Wealth is now more widely spread. Moreover a high proportion of privately owned wealth is invested in the matrimonial home. Because of the recognition by society of the equality of the sexes, the majority of

46 *Garcia v National Australia Bank* [1998] CLR 404 (Gaudron, McHugh and Hayne JJ).

47 *Liu v Adamson* [2003] NSWSC 74.

48 See *Commonwealth Bank of Australia v Allregal Enterprises Pty Ltd* [1999] WASC 186.

49 *Barclays Bank Plc v O'Brien and another* [1194] 1 AC 180.

50 *Garcia v National Australia Bank* [1998] CLR 431 (Kirby J).

matrimonial homes are now in the joint names of both spouses. Therefore in order to raise finance for the business enterprises of one or other of the spouses ... [there] is a need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile ... it is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions.⁵¹

This focus on the family home as a measure of economic value is one way in which the case endorses the economic aspects of the marriage relationship. Others are discussed below.

Impact of the Decision

The *Garcia* case sparked much discussion among legal commentators, with some of this discussion uncharacteristically moving away from the legal principles at stake and towards the social and normative implications that emerged from the decision.

Discussion of the case focussed on the decision's implications for women, with many commentators taking Justice Kirby's view that the decision represented a step back for women's equality before the law. This view is founded upon the argument that married women in modern Australia are not, and should not be seen to be, ignorant of the business decisions of their husbands. For many, the decision represents a view of marriage which is founded upon inequality and dependence of a wife upon her husband, and thus represents a denial of the many advances that women have made in the decades since the *Yerkey v Jones* decision. Berna Collier is one of many people who strongly argued against the decision along these lines, stating:

The advance in the status and education of women, the increasing role of women (including wives) in business and commercial affairs and the variety of personal relationships today all make a principle fashioned in terms of a wife's disadvantageous position vis-à-vis her husband, unsafe when stated as a general rule of universal application. Even as a statement of a *prima facie* position the statement is now unsound and objectionable in principle. It is also of dubious accuracy in practice.⁵²

In many ways the decision is perplexing. On the one hand, it says that modern marriage is no longer an institution that oppresses women. However, the majority of judges wanted to retain protection for those women who are in need of it. The Court did not want to remove the special features of that protection that are so

51 *Barclays Bank Plc v O'Brien* [1994] 1 AC 188 (Browne-Wilkinson LJ).

52 Collier, 'The Rule in *Yerkey v Jones*' 79–80.

uniquely applicable to married women. The Court did recognise that the special disadvantage can occur equally for husbands, partners in de facto and same-sex relationships, but they were unwilling to subsume the protection into a broader legal principle such as unconscionability or the principle as stated by *O'Brien*. Why is this so?

I believe that the answer can be found by looking at the decision from a different angle. The majority of the High Court in the *Garcia* case was not interested in a discussion about how much marriage had changed, nor to what extent married women engaged in economic decision making in a modern Australian marriage. Instead, the decision makes more sense if we see it as being foremost about the meaning of marriage. There are three main features of marriage which the *Garcia* decision reinforces: first, that marriage is an economic as well as emotional union; second, that once married a couple's economic interests become united; third, and most obviously, that wives and husbands should have trust and confidence in each other.

What is Marriage According to *Garcia*?

Garcia represents an explicit recognition in law that marriage is as much a relationship about economics and money as it is about anything else. The relationship is presented as inevitably involving business decisions and entanglements. Despite the fact that the Garcias had separate businesses, Mrs Garcia was called upon to assist in the business affairs of her husband in different ways. The Court does not examine these actions through the lens of business dealings but, rather, as the economic aspects of a marriage relationship. This implies different values from those we usually associate with economic activity/interest that occurs in the marketplace. In a marriage this 'work' is associated with the ethics of altruism, care and love.

An explicit recognition of the economics of marriage in the case can be found in its discussion of the family home. The family home,⁵³ while imbued with so much emotional significance, is recognised as an economic asset that must be protected. Justices Kirby and Callinan in *Garcia*, and Lord Browne-Wilkinson in *O'Brien*,⁵⁴ were concerned that a decision based on the special equity of

53 D N Benjamin, *The Home: Words, Interpretations, Meanings and Environments* (Avery, Aldershot 1995); L Fox, *Conceptualising Home* (Hart, Oxford 2007); S Bright & J Dewar (eds), *Land Law Themes and Perspectives* (Oxford University Press, Oxford 1998).

54 *Barclays Bank PLC v O'Brien and another* [1994] 1 AC 180.

wives would jeopardise the economic utility of the family home. However, the economic discourse of marriage in *Garcia* goes further. It is more than a recognition, it is an economic unification of a married couple's interests.⁵⁵

The *Garcia* case reinforces the idea that, once married, a couple's economic interests become unified. As we saw previously, what this actually meant in the past was that, upon marriage, women ceased to have an independent economic/commercial existence.⁵⁶ While this is no longer the law, the unity of economic interests between a husband and a wife remains.

In *Garcia* we saw that the wife played an important role in assisting her husband fulfil formal business requirements, with the family home used to assist in his business requirements. The judgement takes this as a perfectly normal state of affairs. There was nothing wrong with a woman supporting her husband in his business affairs without necessarily having any direct involvement, knowledge or authority in those affairs.

In all three *Garcia* cases, there is no suggestion that a wife should not help her husband out in his business and financial affairs, even when she knows nothing about them. There is amazing tolerance for the fact that she was completely unaware of the business dealings of the companies of which she was a director. There is also tolerance for the fact that her husband forged her signature. The fact that she was passively involved was not seen as a problem. As Janine Pascoe puts it, the special equity cases do not require wives to act with care and diligence. It requires them not to act at all.⁵⁷ *Garcia* is not concerned with changing this, focussing instead on how to protect a wife when the trust she has placed in her husband turns out to be illusory. *Garcia* assumes economic unification in marriage such that self-interest, usually considered to be the necessary driver for economic activity in the marketplace, is suspended when considering economic activity in marriage.

The other aspect of marriage that emerges from *Garcia* is the idea that marriage embodies trust and confidence between a husband and wife. The Court never explained what trust and confidence meant, but it is my view that these can be read as love, or at the very least, as elements of love. Trust and confidence can of course exist in relationships other than romantic ones. One can speak of trusting a business partner or an advisor, for example. Similarly, one can have confidence in another person's ability without loving them. However, can there be love without trust and confidence? While this is arguable, we can say with more certainty that trust and confidence *may* constitute elements of

55 This has limits. For example, when it comes to property division under the Family Law Act there is no assumption that all assets are equally owned.

56 See chapter one's discussion on coverture.

57 J Pascoe, 'Women Who Guarantee Company Debts: Wife or Director?' [2003] 2 *Deakin Law Review* 12.

love.⁵⁸ A telling point is the fact there have not been any cases where trust and confidence outside of a romantic relationship have been successful in giving rise to the defence in *Garcia*.⁵⁹

A plausible interpretation of the majority in the High Court decision of *Garcia* is that, once you are married, you have to trust your husband/wife and have confidence that the economic decisions they are making are right. What the majority want to enforce is the idea that it is not outmoded for a woman to trust her husband and leave him to conduct business matters if that is what she chooses. Laws should not erode this principle of trust and confidence in marriage but rather protect it by supporting those (more commonly women) who find themselves disadvantaged when that trust and confidence has been abused. *Garcia* avoids any legal development that places a married woman in a position where she must distrust her husband, where marriage is seen, to use Justice Kirby's phrase, as a 'suspect relationship'.⁶⁰

Despite his dissent, Justice Kirby actually has a similar argument, although he arrives at it in a slightly different way. He rejects any suggestion that we should interpret marriage in any way that entrenches it as anything less than an embodiment of trust and confidence. In arguing against seeing marriage as giving rise to undue influence, he asks, 'Is that what marriage has come to in this day and age, that from being a relationship of complete trust and devotion, it has become a suspect relationship?'⁶¹ In his judgement, Justice Kirby, like the majority, was interested in preserving marriage as a special 'space'. Kirby J fails to see that the majority had the same objective.

That *Garcia* did not want to deny or minimise trust and confidence (or love) in the marriage relationship is a point recognised by Elizabeth Stone,⁶² who has argued that the distinctiveness of the *Garcia* principle lies in its recognition of the unique feature of the marriage relationship. She says, 'the High Court has taken judicial notice of a feature of the marital relationship which is highly unusual: a fully competent adult may choose to remain ignorant of her legal affairs without being careless, and this fact is notorious'.⁶³

58 Trust is discussed as an element of romantic love for another purpose in Delaney, 'Love and Loving Commitment' 342.

59 To date the defence has been very limited, although it has been applied to a child-parent relationship in *State Bank of NSW v Layoun* [2001] NSWSC 113; Higgins CJ in *Watt v State Bank of New South Wales* [2003] ACTCA 7 was very strong in his opinion that it should not apply to parent child relationships.

60 Transcript of Proceedings *Garcia v National Australia Bank* (High Court of Australia S18/1997 March 1998) (Kirby J).

61 Transcript of Proceedings *Garcia v National Australia Bank* (High Court of Australia S18/1997 March 1998) (Kirby J).

62 E Stone, 'The Distinctiveness of *Garcia*' (2006) 22 *Journal of Contract Law* 170–193.

63 Stone, 'The Distinctiveness of *Garcia*' 178.

To be successfully applied, therefore, *Garcia* requires a fact situation which ‘hinges not on wrongdoing but on excusable ignorance’ and where that excusable ignorance is a ‘notorious feature of the relationship’,⁶⁴ a ‘normal and unremarkable incident’⁶⁵ of the relationship. Stone says that to succeed using *Garcia* ‘it must be established that it [the relationship] is of such unusual trust and confidence that ignorance of one’s own affairs is an outcome both likely and defensible’.⁶⁶ This, she claims, can only be found in marriage, maybe in de facto relationships, and possibly in same-sex relationships, but further than this it is unlikely to go. She says it is simply not ‘a normal feature of other relationships to cede total control of one’s affairs’.⁶⁷

Garcia should be limited to circumstances where a choice to remain ignorant of one’s own financial and legal affairs is not merely possible but normal; not merely understandable but excusable. Beyond marriage, de jure or de facto, such relationships are unlikely to be found.⁶⁸

Recognising this aspect of the relationship explains why the decision has been limited in its application in subsequent cases. It also makes sense of a decision that otherwise appears to be at odds with other central legal principles which apply in commercial dealings. The *Garcia* approach makes sense if we return to the interpretation that the High Court wanted to retain marriage first and foremost as an emotional relationship:

[T]he fact that protection is given in such circumstances must be understood to be quite anomalous. It is submitted that the protection extended to mistaken wives is justified, but that the intimacy of the relationship and the social desirability of encouraging such intimacy, which provide the justification for that protection are unique.⁶⁹

In *Garcia* the High Court was recognising that there is a conflict between having love — as manifested in trust and confidence — and economic dependence in a relationship, and that this situation may lead one to a disadvantaged position. The Court was mindful of the fact that the disadvantage was more often than not experienced by wives and therefore wanted to highlight that special protection for them. This reading of the case implies that the High Court’s view is in harmony with the feminist critiques of both love and marriage, and the *Garcia* decision can be read as an attempt to accommodate those critiques. The Court was also, however, attempting to reconcile the conflicting paradigms of economics and love, of the market and the home. The decision is an indication of the conflict

64 Stone, ‘The Distinctiveness of Garcia’ 178.

65 Stone, ‘The Distinctiveness of Garcia’ 186.

66 Stone, ‘The Distinctiveness of Garcia’ 180.

67 Stone, ‘The Distinctiveness of Garcia’ 180.

68 Stone, ‘The Distinctiveness of Garcia’ 188.

69 Stone, ‘The Distinctiveness of Garcia’ 180.

(discussed earlier) that law faces between giving voice to people's economic rights and interests that coincide with their personal intimate relationships, of retaining the distinctiveness of marriage and marriage like relationships while enforcing their economic and commercial rights.

Conclusion

The *Garcia* case incorporates an economic as well as a romantic discourse of marriage. The romantic discourse of marriage emerges from the High Court's focus on marriage as a relationship of trust and confidence, which I have argued can be read as elements of love. As well as reflecting these two discourses in their judgement, the High Court in *Garcia* goes further and recognises that they may be the cause of conflict and disadvantage. The Court's reasoning reflects the idea that loving someone, acting altruistically, and trusting their spouse totally, including in business affairs, may leave one of the partners to a marriage at a disadvantage. Even in modern Australia, with its many social changes to gender roles and the institution of marriage, the Court believed this was more likely to impact upon a wife than upon a husband. In recognising this, the judgement of the majority could be interpreted as reflecting the feminist critiques of love and marriage outlined earlier: that patriarchy renders women vulnerable in love. By continuing the *Yerkey v Jones* principle in *Garcia*, the Court is accommodating this critique but is not disrupting the established discourse of love and marriage.

The romantic discourse that remains, and is even nurtured after *Garcia*, is that upon marriage a couple should trust and have confidence in each other, and be free to act altruistically rather than self-interestedly. Married couples should not be suspicious of each other's motives. Such behaviour would be at odds with the emotional aspects of the marriage relationship. Whether we use the word love or not, this is a message that emerges unmistakably from the case. Trust and confidence (or love) are part of marriage and should be part of marriage. This ought to be not only recognised but also nurtured and dealt with when it creates problems. Nevertheless, despite the acknowledgement of the emotional aspects of marriage, the reality is that, as evidenced in the *Garcia* case, economic and romantic discourses can conflict with each other. The case, therefore, represents the dilemma discussed at the beginning of this chapter, of how to reconcile romantic love with the economic and financial aspects of the marriage relationship. The rules of love and the rules of business and economics are not the same. The *Garcia* case attempts to reconcile this by alleviating against the economic disadvantages that can arise when love and marriage fail.

The importance of this case for this book lies with what it claims about love and marriage. When read in this context, *Garcia* establishes that marriage

in modern Australia cannot be read independently of economic or romantic discourses, and that while these can conflict they are both to be accommodated rather than eroded by legal principles. The case shows the difficulty that the law has had in reconciling the economic realities of an intimate relationship. The law has wanted to retain the distinctiveness of the marriage relationship, and has not wanted to reduce marriage to a business — wives to housemaids and sex workers, and men to financial providers — and therefore selectively chooses which economic aspects of the relationship to honour. In *Garcia*, the Court focussed on the economic value of the home. This is in keeping with the Hasday's argument that the law only acknowledges those aspects that fit into a paradigm of a unified set of interests, the family home more than any other property is loaded with emotional meaning. Whether this selective honouring of economic agreements reflects the modern understanding of marriage as a relationship based on love which lasts for as long as the love does, is debatable.

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