Quasi-Matrimonial Property Division and Judicial Alchemy

by

Helen M. Dervan

* Winner of the Law Review Prize for 1984

I. INTRODUCTION

In the recent Australian decision of *Seidler v Schallhofer*,[1] Hutley JA commented that "[t]he courts should not become alchemists transmuting the ashes of dead passion into gold". This remark is one of many emerging from the courts on the availability of recovery of property for the parties of broken *de facto* relationships.

In recent legal history, the courts acted on the assumption that the institution of marriage was to be protected from anything which undermined it.[2] In applying this assumption, "it was natural that the law should make the results of other kinds of sexual relations as disadvantageously different from those in marriage as possible".[3]

However, change in social mores and widening social acceptance of couples living together without being formally married[4] is destroying the foundations on which this assumption was set. Concomitant with the increasing number of informalised relationships are disputes as to division of property on their breakdown.

As parties look to the courts for resolution of disputes, the judiciary has been set the task of developing new principles to govern recovery.

[1] [1982] 2 NSWLR 80, 103. This case deals mainly with the legality of agreements to continue de facto relationships for a specified period. For comment see Bates, Private Law and Public Policy: An Extrapolation from *Seidler v Schollhofer*, 57 ALJ 460 (August 1983).

[2] *Ibid.*, 99.

[3] *Idem.*

[4] *Bernard v Josephs* [1982] Ch 391; [1982] 3 All ER 162; *Re Evers Trust* [1980] 3 All ER 399, 401, *per* Ormond LJ: "This is a situation which is occurring much more frequently now than in the past and is a social development of considerable importance with which the courts are now likely to have to deal from time to time."

Where formerly *de facto* spouses were treated as strangers with regard to property division, the general acceptance of this type of relationship has precipitated the search for a more equitable method of property division.

In *Allen v Snyder* Glass JA commented:

> "The velocity of social change affecting, not only the financial balance in the relationship of husband and wife, but also producing new forms of association outside marriage has, indeed, produced a flurry of litigious activity. New situations have, it appears, produced some new legal rules. It is inevitable that judge-made law will alter to meet the changing conditions of society. That is the way it has always evolved."[5]

Various jurisdictions are looking in different directions for legal solutions. In Canada, those judicially "bold spirits"[6] have embraced the remedial constructive trust based on unjust enrichment as the new touchstone of recovery. In New Zealand, Australia and England, the "timorous souls"[7] are still searching for a definite principle to follow.

This article intends to examine how far we have come in achieving a cohesive legal principle for resolving quasi-matrimonial disputes. In particular, it is intended to look at the device of the constructive trust and the different guises in which it appears.

II. THE GENERAL LAW

Unlike *de jure* spouses whose rights as to property are legislated for,[8] the proprietary rights of *de facto* spouses are governed by the law of property.[9] In general, where there is a dispute as to beneficial ownership of an asset, the courts will allocate interest according to the formal title of the asset. Thus, where a house is acquired in the joint names of *de facto* spouses, they will usually be regarded as holding the beneficial interest jointly. Where, however, one party has title to an asset, that party will generally be entitled to full beneficial ownership of it.

While these rules may provide just solutions for disputes between strangers, it is trite to say that between *de facto* spouses, they can work serious injustice.[10]

Where formerly extra-marital relationships were considered im-

[5] [1979] 2 NSWLR 685, 689. For discussion see R L Deech, "The Case Against Legal Recognition of Cohabitation" (1980) 29 Int & C LQ 480. See for judicial comment: *Livingstone v Livingstone* (1981) 4 MPC 129, 135 *per* Somers J; *Seidler v Schollhofer, supra*, 100, *per* Hope JA.

[6] *Candler v Crane Christmas and Co* [1951] 2 KB 164, 178.

[7] *Idem.*

[8] Matrimonial Property Act 1976.

[9] New South Wales Law Reform Commission Issues Paper, "De Facto Relationships" (1981), 65/NSW Law ipd.

[10] *Ibid*, 66

moral[11], the law, by providing parties with rights to property equivalent only to those of strangers, and by failing to recognize or enforce agreements or promises made within them, invoked a practical method of discouraging them.

Today, where some people have a more liberal moral code and where the Legislature has given tacit encouragement by removing some of the rigors of the common law and by conferring benefits on those who cohabit,[12] it is inconsistent that the law should fail to recognise the promises, agreements and realities within a *de facto* relationship and treat them as they would a commercial agreement.[13]

If we look at the Legislature as representing the principles of public policy, then the acceptability of *de facto* relationships is reflected in legislation which tends to treat stable *de facto* relationships in the same way as marriages.[14]

Under section 50B of the Income Tax Act 1976, the principal income earner rebate may be claimed by the *de facto* spouse of a person entitled to claim the benefit.[15] Under sections 51 and 52 of this Act, the dependant spouse rebate has been allowed in respect of *de facto* spouses.[16] Similarly, under section 53 the young family rebate may be claimed by persons living permanently together.[17]

The New Zealand Parliament has shown concern for *de facto* spouses in the Accident Compensation Act 1972. Under s 2, the definition of "dependant" includes, *inter alia*, "any ... person whom [the injured party] might ... reasonably regard or have regarded himself as having a moral duty to support ..." and this has been held to include a *de facto* spouse.[18]

Similarly, illegitimacy has been abolished under section 3 of the Status of Children Act 1969 and the Human Rights Commission Act 1977 attempts to eradicate discrimination in relation to, *inter alia*, marital status.[19]

The apparent injustice of the common law's failure to recognise the

[11] For example, see *Upfill v Wright* [1911] 1 KB 506 where it was held that a landlord whose agent let a flat to a woman could not recover rent. Darling J said at 510: "The flat was let to the defendant for the purpose of enabling her to receive the visits of the man whose mistress she was and to commit fornication with him there. I do not think that it makes any difference whether the defendant is a common prostitute or whether she is merely the mistress of one man, if the house is let to her for the purpose of committing the sin of fornication there. That fornication is sinful and immoral is clear."

[12] This is mainly in relation to social legislation, for instance unmarried parents can obtain maintenance orders against former partners, s 81 Family Proceedings Act 1980; illegitimacy is abolished by s 3 Status of Children Act 1969.

[13] *Livingstone v Livingstone*, *supra*, 134, *per* Somers J.

[14] *Seidler v Schollhofer*, *supra*, 101.

[15] Simcock and Rooke, *N.Z. Income Tax Law and Practice*, Vol 2, para 26.044.

[16] *Ibid*, para 26.060.

[17] *Ibid*, para 26.080.

[18] *Re Edmonds Decision 840* [1982] NZACR 375.

[19] Sections 15 (1), 19 (1), 20 (1), 21 (1), 22, 23, 24.

realities within a *de facto* relationship has led the courts, initially in England[20] " ... to modify traditional property principles in order to achieve results which recognise adequately the respective contributions of parties to [a] relationship."[21]

These modifications which have been made by reliance on the law of trusts, provide a means whereby beneficial interest property may be held "otherwise than in accordance with legal title".[22] In a quasi-matrimonial context, this has been by use of a constructive or resulting trust.[23] Such a trust may arise in three ways: first, where the parties have an express agreement or have expressed common intention that beneficial interest will be shared[24]; secondly, where common intention may be inferred by reason of mutual contribution to the acquisition of assets or by the conduct of the parties and subsequent financial contributions, direct or indirect[25]; and thirdly (though there is some conflict of judicial authority) where common intention can be imputed to the parties and a solution imposed which accords with the intentions of reasonable people.[26]

In modifying the traditional approach, it is alleged the courts have extended the scope of the law of trusts, and in particular the boundaries of the constructive trust and altered the basis on which the institution has stood.[27] Before proceeding, it is pertinent to examine the traditional view of the constructive trust in comparison with its American counterpart, which it is alleged we are emulating.[28]

A. The Traditional English Approach

The traditional concept of the constructive trust is that it is a substantive institution where title to property is in one party, but

[20] These changes are largely due to Lord Denning. Initial changes related to *de jure* spouses, eg *Heseltine v Heseltine* [1971] 1 WLR 342; then to *de facto* spouses, eg *Cooke v Head* [1972] 1 WLR 518; [1972] 2 All ER 38; *Eves v Eves* [1975] 1 WLR 1338; [1975] 3 All ER 768. For comment, see Lesser, "The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot" (1973) 23 Uni of Toronto LJ 148; Oakley, "Has the Constructive Trust Become a General Equitable Remedy?" (1973) 26 Current Leg Prob 17 at n 23.

[21] New South Wales Law Reform Commission Issues Papers, *supra*, 66.

[22] *Idem.*

[23] *Gissing v Gissing* [1971] AC 886.

[24] This is similar to *Keech v Sandford* (1726) Sel Cas & King 61; 25 ER 223 where Equity will not permit a party to set up the legal title to defeat the interest that party promised to recognise. See *McMahon v McMahon* [1979] VR 239.

[25] *Gissing v Gissing, supra.* See *Malsbury v Malsbury* [1982] 1 NSWLR 226. Here parents contributed to the purchase price of a house which was registered in their son's and his wife's names. Prima facie, where financial contribution is made, the shares will be in proportion to the respective contributions.

[26] Eg *Falconer v Falconer* [1970] 1 WLR 1333; [1970] 3 All ER 449; *Cooke v Head*, [1972] 1 WLR 518.

[27] New South Wales Law Reform Commission Issues Paper, *supra*, 66; Oakley, *op. cit.*; Lesser, *op. cit.*

[28] Oakley, *op. cit.*; Lesser, *op. cit.*

where beneficial interest is by the rules of Equity[29] in another.

It arises by operation of law, regardless of the intentions of the parties, where justice and good conscience demand it.[30] Historically, the "demands of justice" have been confined to specific categories,[31] which include: (1) where the trustees use their fiduciary position to obtain some benefit for themselves[32]; (2) where persons in fiduciary relationships (not express trustees) acquire an interest in property by virtue of their position[33]; (3) where strangers receive trust property with actual or constructive notice that it is trust property acquired in breach of trust.[34]

Generally, some "legal wrong" must be committed by the party on whom the trust will be imposed.[35] Oddly, no definition of a "legal wrong" exists, and no general principle has been found to indicate when the rules of Equity will operate.[36] While some would applaud the fact that the theoretical boundaries are uncertain so "as not to restrict the court by technicalities in deciding what the justice of a particular case may demand"[37] this imprecision leaves the law in an unsatisfactory state. It is perhaps this vagueness that leaves the trust such a fertile ground for judicial law reform.

As the constructive trust is substantive, the constructive trustee has certain duties to perform though they are not as rigorous as the duties of an express trustee. They may require a constructive trustee to hand over any benefit received from a breach of trust together with interest.[38] Being a type of trust it gives a right in *specie* to wrongfully taken trust property.

B. The American Approach

In comparison, the American constructive trust is a "purely

[29] Nathan and Marshall, *Cases and Commentary on the Law of Trusts* (Stevens, 6th ed, D J Hayton), 551; *Hardoon v Belilios* [1901] AC 118, 123 *per Lord Lindley*. The constructive trust is analogous to an express trust and requires trust property, a trustee and a beneficiary: *Re Barney* [1892] 2 Ch 265, 272 per Kekewich J.

[30] *Keech v Sandford* (1726) Sel Cas & King 61; 25 ER 223; *McMahon v McMahon* [1979] VR 239.

[31] Oakley, *op. cit.*, sees these as still open to extension.

[32] *Keech v Sandford, supra.*

[33] *Regal Hastings v Gulliver* [1942] 1 All ER 378.

[34] *Barnes v Addy* (1874) LR 9 Ch 244.

[35] *Avondale Printers and Stationers Limited v Haggie* [1979] 2 NZLR 124 at 160, 163, 164 *per* Mahon J, the legal wrong must amount to actual or constructive fraud; *Te Rama Engineering Limited v Shortland Properties Limited* (Unreported, 17 June 1982 (A. 384/76)), 8 *per* Casey J.

[36] Oakley, *op. cit.*; *Carl Zeiss Stiftung v Herbert Smith & Co (No.2)* [1969] 2 Ch 276, 301. In *Avondale Printers, supra*, Mahon J at 159 considers the connecting link to be a finding of fraud on the part of the constructive trustee.

[37] *Carl Zeiss Stiftung, supra*, 300 per Edmund-Davies LJ.

[38] Maudsley, "Constructive Trusts" (1977) 28 NILQ 123, 124, but note *Lister v Stubbs* (1890) 45 Ch D 1.

remedial institution",[39] distinct from the express trust.[40] *The American Restatement* describes its operation as follows:

> Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he was permitted to retain it, a constructive trust arises.[41]

A right to restoration of a benefit is given to a person if the benefit has been gained at that person's expense and if the retention by the other is unjust.[42]

Contrary to English law, where relief is granted *because* a constructive trust has arisen, the American approach affords relief because otherwise a defendant would be unjustly enriched. Scott described it succinctly when he said the party is not compelled to convey the property because he is a constructive trustee, it is because he can be compelled to convey it that he is a constructive trustee.[43]

As an indication of what is unjust, the *Restatement* states areas (not exhaustive) where a constructive trust may remedy unjust enrichment.[44] These include: (1) acquisition of an interest in land by oral agreement; (2) acquisition of property by a fiduciary; and (3) acquisition of property from a fiduciary who is in breach of a duty to a bona fide purchaser for value. These areas are comparable to the categories under the English approach.

As the constructive trust is remedial, it is not bound to a proprietary remedy, rather the remedy may be made to fit the unjust action and both personal and proprietary relief is available.

III. RECENT DEVELOPMENTS IN THE ENGLISH INSTITUTION

In *Pettit v Pettit*[45] and *Gissing v Gissing*[46] the House of Lords dealt with the problem of quasi-matrimonial property division by relying on a strict trust approach. Under this approach, relief is available where an agreement as to beneficial interest exists. There must be evidence of

[39] R. Pound, "The Progress of Law, 1918-1919, Equity" (1920) 33 Harv L Rev 420, 421.
[40] Scott, (1955) 71 LQR 39, 41; Dewar, "The Development of the Remedial Constructive Trust" (1982) 60 Can Bar Rev 265.
[41] The American Restatement of the Law of Restitution §160.
[42] Scott and Sealy (1938) 54 LQR 29,32.
[43] Scott, *op. cit.*, 41. See eg *Simonds v Simonds* (1978) 408 NYS 2d 359, where monies paid to a second wife under an insurance policy of her husband on his death were held payable to the first wife and the deceased had provided she was to receive the benefit of the policies up to $7000. Breitel CJ saw the separation agreement as vesting in the first wife a persisting equitable right to the policies. It would unjustly enrich the second wife if she received them at the first wife's expense. Consequently, the second wife was made a constructive trustee of the monies for the first.
[44] As summarised in Dewar, *op. cit.*, 278.
[45] [1970] AC 777.
[46] [1971] AC 886.

an agreement or declaration between the parties as to ownership. By finding that a constructive trust exists, the courts are only giving effect to what the parties themselves have expressed.

If, however, no express agreement exists, the House of Lords indicated that common intention of sharing could be inferred. This process has been described by Goff J in *Re Densham*:

> "... the Court may infer from the circumstances and the conduct of the parties, including subsequent conduct, that there was an agreement and if it does the Court will give effect to that agreement."[47]

In applying the above rules, the House of Lords made it clear that where intention was not express, there had to be a proper evidential basis for inference. Where financial contribution has been made to the purchase price or in making substantial improvement to property, it may be relatively easy to infer common intention to share.

However, in the absence of financial contribution, inference of common intention is more difficult.

In *Gissing*, Lord Diplock stated:

> "Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties no material to justify the Court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household."[48]

In so deciding, the majority in the House of Lords in *Gissing* rejected the proposition that rights could be determined solely by what was reasonable and fair.[49] Lord Morris said candidly that "... the court does not describe how the parties might have ordered their affairs: it only finds out how they did."[50]

Unfortunately, the judgments in *Gissing* and *Pettit* have given rise to uncertainty as no consensual approach was given as to the type of trust which arose and what the requirements of the trust were.

This lack of precision can be seen in *Gissing*. When looking at the requirements of common intention to share beneficial interest, Lord Morris and Viscount Dilhorne held that common intention had to actually exist (it could be express or implied). Evidence of its existence could be derived from the conduct and words of the parties. Both rejected the proposition that the courts could impute intention on the basis of what a reasonable person in the position of the parties would do.

[47] [1975] 1 WLR 1519, 1525; [1975] 3 All ER 726, 731.
[48] *Supra*, 909.
[49] Similarly, this was rejected in *Pettit, supra, per* Lord Reid at 793; Lord Morris at 803 and 805; Lord Hodson at 809; and Lord Diplock at 825.
[50] *Gissing, supra*, 898.

Lord Reid, on the other hand, suggested that absence of evidence of an express or implied agreement did not exclude imputation. But, he added, for a court to impute intention, any contribution made by a spouse had to be substantial.

Lord Diplock, while he felt obliged to follow the majority, also advanced the proposition that the Court could intervene where a contributing spouse had relied detrimentally on the legal owner. The legal title-holder to property could be constructive trustee where that spouse had "... conducted himself if by his words or conduct he induced the *cestui que trust* to act to his own detriment in reasonable belief that by so acting he was acquiring a beneficial interest in the land."[51]

Relying on this impression, the English Court of Appeal, with Lord Denning in the vanguard,[52] has widened the availability of recovery by applying a constructive trust to remedy injustice and unfairness. Described as a "liberal process ... to be applied in cases where the defendant cannot *conscientiously* keep ... property for himself alone,"[53] the trust is founded on the court's imputation of intention to share beneficial ownership.

Lord Denning described the procedure in *Falconer v Falconer*:

> "It is done not so much by virtue of an agreement, express or implied, but rather by virtue of a trust which is *imposed* by law. The law imputes to husband and wife an intention to create a trust, the one for the other, it does so by way of an *inference* from their conduct and the surrounding circumstances even though the parties themselves have made no agreement on it."[54]

The effect of this development can be illustrated by the case of *Eves v Eves*.[55] An unmarried couple with children purchased a house in the name of the father, who provided all the purchase money, some by way of mortgage.

The mother's contribution was in motherly services and also in work on the premises which was considered by Lord Denning to be beyond normal domestic duties. The mother had stripped wallpaper,

[51] *Supra*, 905.

[52] Lord Denning's legal prowess and ingenuity has been recounted by various writers, *inter alia* Oakley, *op. cit.*, Dewer, *op. cit.*, Lesser, *op. cit.* In summary, he has gleaned favourable comments from minority judgments in the House of Lords to shape his "new model" constructive trust. Particular reliance has been placed by Lord Denning on Lord Diplock's judgment in *Gissing, supra*, where he said at 905 "... it would be inequitable to allow a trustee to deny a *cestui que trust* a beneficial interest in land acquired".

See, *Davis v Vale* [1971] 1 WLR 1022; [1971] 2 All ER 1021; *Hazell v Hazell* [1972] 1 WLR 301; [1972] 1 All ER 923; *Heseltine v Heseltine* [1971] 1 WLR 342; [1971] 1 All ER 952; *Re Cummins, Cummins v Thompson* [1972] Ch 62; *Hargrave v Newton (Hargrave)* [1971] 1 WLR 1611; [1971] 3 All ER 866; *Eves v Eves* [1975] 1 WLR 1335; 3 All ER 768; *Cooke v Head* [1972] 1 WLR 518; [1972] 3 All ER 744; *Bernard v Josephs* [1982] Ch 391; *Burns v Burns* [1984] 1 All ER 244.

[53] *Hussey v Palmer* [1972] 1 WLR 1286, 1290; [1972] 3 All ER 744, 747 (emphasis added).

[54] [1970] 1 WLR 1333, 1336; [1970] 3 All ER 449, 452 *per* Lord Denning.

[55] *Supra.*

painted parts of the house, broken up a large area of concrete, done a lot of work in the garden, and helped demolish a shed and rebuild a new one.

The Court held the mother was entitled to a quarter share in the house under a constructive trust, which arose because the father had so conducted himself that it would be inequitable to deny the mother beneficial interest in the land acquired.

By recognising physical labour as evidence on which imputation of intention can be based, the Court of Appeal went far beyond what the House of Lords countenanced.

The application of this trust has not been restricted to married or to *de facto* couples, but is available to "husbands and wives, to man and mistress and maybe to other relationships too."[56]

Unlike the traditional English approach where relief is granted because a constructive trust arises, and the trust arises where some "legal wrong" has been committed, this new approach relies on the court's looking to the acts and events which make circumstances unjust. A trust will be imposed where circumstances are so inequitable that they afford relief by a trust.

To the extent that the trust relies on the conscience of a party and on that party's benefitting unlawfully at the expense of another, it is remedial.

On first impression, this innovation appears to have resolved the problem of property division between *de facto* spouses. On a liberal interpretation, it may appear that the courts, on perceiving inequity, can provide a just solution by imposing a constructive trust. Certainly in *Hankinson v Kyle*[57] Hardie Boys J saw this use of the constructive trust as producing the same result as if the Matrimonial Property Act 1976 had been extended to *de facto* relationships.

Closer examination demonstrates the axiom that there is no easy answer. Although emphasis may be on using them remedially, the courts have not completely broken free of the traditional approach and its characteristic proprietary remedy.

Latest decisions in the English Court of Appeal show that it has retreated from looking at the overall conduct of parties, back to looking at direct or indirect financial contribution, in absence of express or implied agreement, as the only means of altering proprietary interest and imposing a constructive trust.

[56] *Cooke v Head, supra,* 38. For application outside quasi-matrimony see *Hoare v Hoare* (5 November 1982, reported in *London Times*, 9 November 1982, Foster J, Ch Divn). Here, the plaintiff was a widowed daughter-in-law of the defendant. For case comment see 57 ALJ 111 (February 1983). It also applies in contractual licence cases: see *Bannister v Bannister* [1948] 2 All ER 133; *Binions v Evans* [1972] Ch 359.

[57] (1982) 1 NZFLR 353, 359.

The most recent considerations of imputation are the Court of Appeal decisions in *Bernard v Josephs*[58] and *Burns v Burns*.[59] In both these decisions, the Court emphasised that in order to alter existing proprietary rights, and divest a legal title-holder of property, the party who has no legal title must make some "real" or "substantial" financial contribution toward the acquisition of assets, usually this is towards the purchase of a family home.[60] A non-titled party may get a share in beneficial ownership if that party (a) pays part of the purchase price; or (b) contributes regularly to the payment of mortgage instalments; or (c) pays off part of the mortgage; or (d) makes a substantial financial contribution to the family expenses so as to enable the mortgage instalments to be paid.[61]

Accordingly, where a party has been working and applying substantially all income towards housekeeping, that party may be held to have made a direct financial contribution toward acquisition of a family home in that "... pooled earnings [have] at least made it easier for [the titled party] to pay the mortgage instalments".[62]

Where financial contribution has been made, the English Court of Appeal in *Bernard* and in *Burns* has said it will assess respective shares in property by looking at the way beneficial interest was held at the date of acquisition.[63] But in so doing, will look at contribution made by parties up to separation[64] and sometimes beyond.

The court leaves open the question whether intention can be imputed where property has been acquired before the parties have met, yet financial contribution has been made by way of substantial improvement to the property. In these cases it may be that the courts will be more likely to find express agreement or infer agreement.[65]

However, where the court is looking to impute intention the decision in *Burns* holds that payments towards chattels, decoration of the property, rates, telephone bills and other household expenses after acquisition will not be sufficient to afford relief.[66]

What is made absolutely clear in these decisions is that housekeeping, the fulfilling of domestic duties and raising the children of the relationship will *not* allow imposition of a constructive trust.

[58] [1982] Ch 391; [1982] 3 All ER 162.
[59] [1984] 1 All ER 244.
[60] *Ibid*, 265 *per* May LJ; 252-254 *per* Fox LJ.
[61] *Ibid*, 252 *per* Fox LJ.
[62] *Ibid*, 263 *per* May LJ; 253 *per* Fox LJ.
[63] See also *Gordon v Douce* [1983] 2 All ER 228, 230 per Fox LJ.
[64] *Bernard v Josephs, supra*, 404 *per* Griffiths LJ.
[65] See *Hayward v Giordani* [1983] NZLR 140 — an express agreement as to common intention was found.
[66] Burns, *supra*. In *Pettit, supra*, helping to redecorate and improve the property did not afford relief. In *Gissing, supra*, laying a lawn and making savings of earnings did not afford relief.

In the words of May LJ in *Burns*:

> "... When the house is taken in the man's name alone, if the woman makes no "real" or "substantial" financial contribution towards either the purchase price, deposit or mortgage instalments by means of which the family home was acquired then she is not entitled to any share in the beneficial interest in that home even though over a substantial number of years she may have worked just as hard as the man in maintaining the family, in the sense of keeping house, giving birth to and looking after and helping to bring up children of the union."[67]

In relation to the laws of property and the decisions in the House of Lords, this may be the correct approach, but it seems anomalous and unjust that marriage is treated as a partnership to which both parties contribute and which affords equal property sharing, yet unformalised relationships may allow very limited property sharing even though they may be as much a partnership. This is particularly so as the judiciary has commented that matrimonial and quasi-matrimonial relationships often invite, intend, and project similar common endeavour.[68]

While it must be recognised that there are many reasons why people commence living together without marriage, not the least of which is because each values their independence and may wish to share living expenses with continuing separate ownership of assets, in many instances the reality is that the couple live in a situation which in every respect parallels marriage apart from its formalisation. Often, where the parties have children, one *de facto* spouse will continue working and be in a position to acquire property. Yet the other, having the prime responsibility of caring for children and fulfilling domesting duties, may be unable to continue earning. Whichever way it is examined, the spouse who continues to earn will be better-placed financially if the relationship breaks down.

In the words of Lord Simon of Glaisdale, "... the cock can feather the nest because he does not have to spend most of his time sitting in it."[69]

A trenchant example of the injustice which exists is *Burns v Burns*[70] where a plaintiff woman and defendant man had lived together for nineteen years and had had two children.

The defendant, two years after cohabitation commenced, purchased a house with his own money. For the first twelve years of the relationship, the plaintiff did not earn as she was engaged in raising the two children and performing domestic duties. Thereafter she obtained employment, using her earnings to contribute to household expenses, to buy fixtures, fittings and household equipment including a washing

[67] *Ibid*, 265.
[68] *Bernard v Josephs, supra*, 399, 400 *per* Lord Denning LJ; *Livingstone v Livingstone* (1980) 4 MPC 129, 134 *per* Somers J.
[69] Extrajudicially, quoted by Lord Hodson in *Pettit, supra*, 811.
[70] *Supra*. New Zealand examples include *Hankinson v Kyle, supra*, note 57, and *Rogers v Rogers* (1982) 5 MPC 129.

machine, and to redecorate the interior of the house. On breakdown of the relationship, she received no share in the house as no financial contribution to acquisition could be found.

The weakness in the application of a constructive trust to remedy such circumstances is that it remains bound by its origins as a substantive proprietary institution and is too blunt an instrument to adequately and fairly sever *de facto* family property into just portions.[71]

As seen above, it fails to recognise physical labour "in an age when labour is recognised as having a value in the same way as capital."[72]

A further criticism of the practice of imputation of intention is its artificiality. Griffiths LJ in *Bernard v Josephs* commented on the air of unreality in the exercise and said that "contributions must be viewed broadly by the judge to guide him to the parties' unexpressed and probably unconsidered intentions as to the beneficial ownership of the house."[73]

As parties do not usually explicitly agree to equitable interests in assets when they commence living together,[74] the courts must "glean phantom intent from the conduct of the parties."[75]

By deeming there to be an agreement as to beneficial ownership even though one may not exist in fact, the courts are relying on a legal fiction. As distinct from actual intention which exists in fact, intention is implied as a matter of law. While legal fictions play an important role in legal developments, their use is limited and they have "no place among the sophisticated."[76]

IV. COMMONWEALTH DEVELOPMENTS

A. New Zealand and Australia

The courts both in New Zealand and Australia have followed the approach of the House of Lords in *Pettit* and *Gissing* in recognising

[71] Hanbury, *Modern Equity* (11th ed), 398: "The constructive trust is too powerful a solution for these cases. The knock-on effects are incalculable."
A court can, however, provide relief by inferring from the conduct of the parties a contract which gives certain benefits to the non-titled holder of property. Such relief is usually available where there are children of the de facto relationship who remain in the custody of the mother and takes the form of allowing continued occupation of a home while the children are of school age. *Tanner v Tanner* [1975] 1 WLR 1346; [1975] 3 All ER 776. The court will be slow to infer an agreement unless there is proper evidence available of an intention to create legal relations: *Horrocks v Forray* [1976] 1 WLR 230; [1976] 1 All ER 737.

[72] Hodkinson, "Constructive Trusts: Palm Trees in the Commonwealth" (1983) Conveyancer & Property Lawyer 420, 423.

[73] *Bernard v Josephs,* [1982] Ch 391, 404; [1982] 3 All ER 162, 170.

[74] *Ulrich v Ulrich* [1968] 1 WLR 180, 188 *per* Diplock LJ; *Rathwell v Rathwell* (1978) 83 DLR (3d) 289 *per* Dickson J.

[75] *Pettkus v Becker* (1980) 117 DLR (3d) 257 at 270. Waters, in his comment in 53 Can Bar Rev 366 (1975) said at 368: "In other words, this 'discovery' of an implied common intention prior to acquisition is ... a mere vehicle or formula for giving the wife (sic) a just and equitable share in the disputed asset".

[76] Scott, *op.cit.,* 41.

that property may be divided between *de facto* spouses where an express agreement as to ownership exists, and where a common intention can be inferred from the financial contributions of the parties.

In the New Zealand decision of *Hankinson v Kyle*[77] Hardie Boys J adopted the reasoning of the majority in *Gissing*. Here, the parties had lived in a *de facto* relationship for six years. Initially, they lived in a house owned by the defendant man which was renovated by them both and sold with the intention of buying another property. A new house was bought in the defendant's name and was renovated, the defendant carrying out most of the work. The plaintiff made no direct financial contribution to the purchase of the second property.

The Court found no express agreement that the plaintiff's contribution should be recognised by a share in the property. Further, there was no evidence found of common intention that the plaintiff was to have a beneficial interest in the second property. The work of the plaintiff was found to be consistent with a sharing of living expenses and continuing separate ownership of assets.

Similarly in the New South Wales decision of *Allen v Snyder*[78], where the parties had lived together intermittently for thirteen years, the court was unable to find any evidence on which they could infer an intention to share. As there was no express agreement the plaintiff was denied relief.

The practice of imputing intention to share remains one of judicial conflict both in New Zealand and Australia.

In New Zealand, a number of High Court decisions have rejected the advances of the English Court of Appeal. Somers J in *Gibson v Gibson*[79] found the ratio in *Cooke v Head*[80] to be unacceptable despite its desirability as a solution in the cases of disputes between *de facto* spouses.

Nevertheless, the New Zealand Court of Appeal in *Hayward v Giordani*[81] has left the way open for intention to be imputed and indicated it might be viewed favourably. We are, according to Cooke J, "... free to adopt the approach of Lord Reid and Lord Diplock in *Pettit* and to apply it to de facto relationships as in substance Lord Denning has done."[82]

In Australia, the courts in different states remain divided on the

[77] *Supra*. See *Buddle v Russell* (Unreported, High Court Auckland, 24 August 1983 (M.391/83)). A caveat based on a claim of an interest in land under a constructive trust is available pursuant to s. 137(a) of the Land Transfer Act 1952.
[78] [1977] 2 NSWLR 685.
[79] (1979) 2 MPC 65.
[80] *Supra*.
[81] [1983] NZLR 140. The Court left the question open in *Brown v Stokes* (Unreported, Court of Appeal, 6 August 1980, (C.A. 51/78)).
[82] *Ibid*, 146.

issue. In *Nemeth v Nemeth*[83] and *Ogilvie v Ryan*[84] imputation of intention has been accepted as a valid means of dividing property. In *Ogilvie*, the court was able to impute intention based solely on the plaintiff woman's action in cleaning for the defendant, in return for which she claimed she was promised she could remain in the house rent-free for the remainder of her life.[85] In this case there was no express agreement and no contribution, direct or indirect, to the value of the property.

However, in *Allen v Snyder*[86], *McMahon v McMahon*[87] and *Kardynal v Dodek*[88], the courts have come out strongly in favour of rejecting imputation. This rejection is based mainly in the argument that imputation of intention lacks a guiding principle or golden thread for application.[89] This argument loses much impact when it is noted that the substantive trust approach itself has no guiding principle.

B. Canada

Having clearly accepted the principle of unjust enrichment as the basis for restitutionary claims,[90] the Canadian courts have had an easier task than their Commonwealth counterparts of finding a means of dividing quasi-matrimonial property.

In *Pettkus v Becker*,[91] the Supreme Court of Canada approved the use of the constructive trust to prevent unjust enrichment and remedy quasi-matrimonial property disputes provided there is (1) an enrichment of one party; (2) a corresponding deprivation of another; and (3) no juristic reason for the enrichment.[92]

While in the majority of cases unjust enrichment has been found where one party has made a direct financial contribution to the ac-

[83] (1977) 17 ALR 500.
[84] [1976] 2 NSWLR 504.
[85] In New Zealand this would be covered by the Law Reform (Testamentary Promises) Act 1949.
[86] *Supra.*
[87] [1979] VR 239.
[88] Noted in Bates, "More Trusts and Antipodean Concubinage" (1982) 46 Conveyancer and Property Lawyer 424; and Neave, "A Postscript: *Kardynal v Dodek*" (1978) 11 MULR 581.
[89] *Allen v Snyder, supra,* 689 *per* Glass JA: "If the foundations of accepted doctrine be submerged under new principles without regard to the interaction between the two there will be high uncertainty as to the state of the law both old and new."
The issue of imputation and de facto relationships generally has been discussed in Australia in *Dale v Haggerty* (1978) Q Case Note (Dec 9); *In The Marriage of Helliar* 5 Fam LR 432; *Vince v Morris* (SC Tasmania, 11 August 1981, No. 21/81); *Murray v Heggs* (1980) 6 Fam LR 781; *Muschinki v Dodds* (SC NSW (CA) 30 July 1982 CA No. 482/82; *Malsbury v Malsbury* [1982] 1 NSWLR 226: *Thwaites v Ryan* (SC Victoria 28 March, 1983, Lib ref A83/49).
[90] *Deglman v Guaranty Trust Co of Canada and Constantineau* [1954] 3 DLR 785.
[91] (1980) 117 DLR (3d) 257.
[92] *Ibid.*, 247, *per* Dickson J. For a New Zealand perspective on unjust enrichment see Sutton, "Unjust Enrichment" (1983) Otago LR Vol 2, No 5, 187.

quisition or improvement of a property in the other party's name,[93] some provincial Canadian courts have recognised the value of physical labour as a means of contribution.

In *Reiss v Reiss*,[94] for example, the parties lived together for fourteen years during which time the defendant woman bought a chicken farm which she worked. While the plaintiff man brought no money into the purchase, he worked hard on the farm. When the property was sold, a capital gain of nearly $100,000 was realised. MacPherson J decided he could not ignore the labour of the plaintiff and imposed a constructive trust in equal proportions.

In the decisions where physical labour has been recognised as a contribution sufficient to base an unjust enrichment claim, it has been labour beyond domestic duties, housekeeping and child rearing. In *Schumacher v Schumacher*,[95] the claim of a *de jure* wife was denied as her direct and indirect contributions did not go beyond "the performance of her duty to the family."[96]

Thus, even where unjust enrichment bases a remedial constructive trust, the anomaly that marriage is a partnership affording equal property division, yet a *de facto* relationship without financial contribution or physical labour over and above housekeeping, domestic duties and raising children, does not, still pervades.

To the extent that unjust enrichment does not recognise such physical labour, the criticism that unjust enrichment itself is too blunt an instrument for equitable property sharing is valid.[97]

V. CONCLUSION

While the law regarding quasi-matrimonial property division is in a state of flux in the Commonwealth, reliance on developing existing trust principles, whether they are based on a use of substantive or remedial trust, may not provide an adequate solution to the ever-increasing number of disputes over property. Even if imputation of intention is accepted as a means of providing relief, it is limited as it fails to recognise contributions by physical labour, by housekeeping, by domestic duties or by child rearing, all of which are recognised contributions within the matrimonial context.

[93] *Sikora v Sikora* 2 RFL (2d) 48 (Alberta); *Murray v Roty* 34 RFL (2d) 404 (Ontario); *Gibbins v Public Trustee for Ontario* 26 RFL (2d) 282 (Ontario); *Brown v Brown* 34 RFL (2d) 433 (Alberta); *Bobrociok v Bobrociok* 1 RFL (2d) 95 (Ontario).

[94] 22 RFL (2d) 152 (Saskatchewan).

[95] 30 RFL (2d) 163 (British Columbia).

[96] *Ibid*, 168.

[97] Klippert, "The Juridical Nature of Unjust Enrichment" (1980) 30 Uni of Toronto LJ 356, "... unjust enrichment is a sledgehammer which is not suitable for cutting a diamond". For discussion in America, see *Marvin v Marvin* 557 P 2d 106.

If we are to attempt to find a solution which is "consistent with the current and perhaps widely-accepted philosophy that the rights of a partner to a union should not necessarily depend on whether it is a union in law rather than *de facto*",[98] it is submitted that it must be by legislation.[99] Only upon well-prepared legislation consequent to a careful consideration of submissions from a wide spectrum of public opinion can the criterion for reform be formulated.

Certainly such change involves questions of social policy which it is for Parliament to determine having due consideration to current social mores.

Parliament has already acknowledged changes in social mores by enacting legislation which eliminates many previous disadvantages of living in a *de facto* relationship under the common law. In so doing, it has set the stage for reassessment and reform of the law regarding *de facto* unions. It is hoped that the task Parliament has set for itself will not be too long in completion.

[98] *Brown v Stokes* (Unreported, Court of Appeal, 6 August 1980, (CA 51/78) *per* Cooke J).

[99] See similar comments in *Hankinson v Kyle, supra*, 360; *Burns v Burns, supra*, 247 *per* Walker LJ.

An attempt has already been made in New Zealand. In the Matrimonial Property Bill 1975, Clause 49 stated:

"Applications by *de facto* spouses — (1) An application to the Court under Section 18 of this Act may be made by either party or both parties to a *de facto* marriage notwithstanding that they are not and never have been married to each other.

(2) If the Court is satisfied that the parties have lived together as husband and wife for a period of not less than 2 years preceding the date of application it may entertain the application if it considers that in all circumstances it would be just to do so."

The clause was, however, struck out by the Statutes Revision Committee, when it reported to the House of Representatives, 23 November 1976.