

## **THE IMPACT OF MATRIMONIAL LAW ON THE ADMINISTRATION OF DECEASED ESTATES**

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### I. INTRODUCTION

It seems not so long ago when the administration of deceased estates was, as a general rule, mercifully free of complications arising from the marital status of the deceased person. That time has gone. Partly because of the higher proportion of broken marriages and partly because of legislative activity in this field, matrimonial law has become a major factor in administration. The subject is so broad as to embrace problems that arise merely because the executor or administrator represents a person who has married. For the most part, however, this article will be concerned with the personal representative of a deceased husband who is survived by a separated wife or a former wife. In such a case the personal representative may face two immediate questions, namely:

- (a) Is the estate bound to meet arrears of periodical payments for the wife's maintenance which accrued in the husband's lifetime?
- (b) Is the estate liable or may it become liable for the wife's maintenance beyond the husband's lifetime and if so, in what way does the incidence of the liability fall?

It will be convenient first to consider these important questions; and then to pass on to consideration of other related matters concerned with rights and succession to property. Some limit must be placed on the scope of the subject, and no attempt will be made to deal with the maintenance of children or with the rare occasions when a wife is under liability for a husband's maintenance; nor will there be more than passing references to maintenance by way of a capital sum or to secured maintenance.

### II. ARREARS OF MAINTENANCE

The question of the liability of a husband's estate for arrears of maintenance payments accrued in his lifetime can assume major proportions when the wife has slept on her rights or has lost track of the husband. Strangely enough there has been comparatively little case law in New Zealand on the subject and the position has been obscure. Were the arrears *prima facie* enforceable as a debt? If they arose out of an order under the Destitute Persons Act 1910 they were, for section 36 of that Act declared money in arrear and unpaid at the time of the death to constitute a debt payable out of the estate. But could the arrears, although declared to be a debt, be remitted? Section 41 of the same Act declared, in general terms, that all moneys payable under a maintenance order made under that Act, so soon as they were in arrear and unpaid, were also to constitute a debt recoverable by action; and section 39 undoub-

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tedly conferred general jurisdiction on a Magistrate to remit arrears which were constituted a debt by section 41. Did section 36 operate to prevent that jurisdiction being exercised after the husband's death, so that arrears, which could have been remitted immediately before his death, could not be remitted on the application of his personal representative? That question was answered in the affirmative in *McDonald v. Frame*;<sup>1</sup> though, with respect, the correctness of at least one of the grounds of that decision seems open to argument.<sup>2</sup> If the arrears arose out of a contractual agreement, then again they constituted a debt; though an agreement for periodical payments registered in the office of a Magistrate's Court had, while it continued in force, the effect of an order under the Destitute Persons Act.<sup>3</sup> If the liability arose out of an order in divorce, then it would appear to have been open to argument whether the arrears were prima facie enforceable as a debt at all.<sup>4</sup> But a Supreme Court order for periodical payments also could be registered in a Magistrate's Court office<sup>5</sup> and, in general, the provisions of the Destitute Persons Act thereupon became applicable to it.<sup>6</sup> Finally, if the arrears were a debt and could not be remitted, to what extent might they have become statute-barred? The judgment in *Grantham v. Gregory*<sup>7</sup> contained helpful guidance in this respect (at least in relation to orders made under the Destitute Persons Act), but there could still be difficult questions as to the effect of payments for the purposes of section 25 (4) of the Limitation Act 1950.

Out of this mass of confusion there has at last emerged a fairly settled order of things. The process of clarification began with the Matrimonial Proceedings Act 1963.<sup>8</sup> Section 76 of that Act now provides, in effect, that money in arrear and unpaid at the death of the party liable under an order made under that Act is to constitute a debt recoverable out of his estate; but (except where the order has been made to bind the personal representative and except with regard to capital payments) no such arrears in respect of a period longer than one year are to be so recoverable without the leave of the Court. The Act declares that this section (so far as applicable and with any necessary modifications) is to apply with respect to orders made under the Divorce and Matrimonial Causes Act 1928.<sup>9</sup> The Domestic Proceedings Act 1968<sup>10</sup> contains provisions to a somewhat similar effect in relation to orders made under that Act or under the Destitute Persons Act 1910.<sup>11</sup> There is thus

1 (1960) 10 M.C.D. 42.

2 Compare *Woodward v. Crutchley* [1962] N.Z.L.R. 221 ("a judgment entered under s. 41 is in its true nature a security for the debt in respect of which it is recovered, and accordingly . . . a reduction or extinction of the debt, whether by payment or by the exercise of the power to remit, must to a corresponding extent extinguish the judgment"—per Richmond J. at p. 224); *Maintenance Officer (New Plymouth) v. Hill Estate* [1967] N.Z.L.R. 481 (in which it was held that the order subsists after the husband's death for the purpose of enabling the removal of a suspension order).

3 s. 47 B Destitute Persons Act 1910.

4 *Fenerty v. Fenerty* (1907) 10 G.L.R. 6; *Eden v. Eden* [1921] G.L.R. 504; compare *Sugden v. Sugden* [1957] P. 120, 135 and see *In re Hudson* [1966] Ch. 209, 212.

5 s. 8 Destitute Persons Amendment Act 1926.

6 s. 17 Domestic Proceedings Act 1939.

7 [1957] N.Z.L.R. 402.

8 Commencing date: 1 January 1965.

9 s. 91 Matrimonial Proceedings Act 1963.

10 This Act replaces the Destitute Persons Act 1910 as from 1 January 1970.

11 ss. 92 and 132 Domestic Proceedings Act 1968.

brought about a much needed degree of uniformity in this respect between maintenance orders made in the Supreme Court and those made in a Magistrate's Court; and some recognition is given, in both instances, to the English practice of limiting enforcement in a general way to twelve months' arrears.<sup>12</sup>

A question may still arise whether the twelve months' arrears can be remitted. In the case of maintenance ordered in divorce, it appears that they can be, by the joint operation of section 47 of the Matrimonial Proceedings Act 1963 (as amended by section 4 of the Amendment Act of 1968) and section 76 (5) of the Matrimonial Proceedings Act (as inserted by section 9 of the Amendment Act). The Domestic Proceedings Act 1968 is less explicit on the point; but section 85 (6) of that Act, though it contains no express reference to a personal representative, confers a general jurisdiction to remit arrears under a maintenance order or registered maintenance agreement, whether or not the order or agreement has ceased to be in force.

With regard to an agreement entered into by parties to a marriage which is subsequently dissolved, section 79 of the Matrimonial Proceedings Act 1963, as amended by section 11 of the Matrimonial Proceedings Amendment Act 1968, now confers express jurisdiction on the Supreme Court to remit arrears due under such an agreement on the application of the personal representative of the party liable.

### III. OPERATION OF AGREEMENTS OR ORDERS FOR MAINTENANCE BEYOND DEATH

Orders made under the Destitute Persons Act 1910 or the Domestic Proceedings Act 1968 for periodical payments for a wife's maintenance do not extend beyond the joint lives of the parties.<sup>13</sup> But, in the case of an agreement for maintenance or an order in divorce, a question can and frequently does arise whether it extends beyond the husband's death. This aspect of the subject will be considered first in relation to contractual agreements and then in relation to orders made in divorce.

*Deeds and agreements for maintenance:* When the question arises solely out of contractual agreement it becomes primarily one of construction. The husband may, for instance, have covenanted to pay a periodical sum as maintenance for his wife until her death or earlier remarriage without expressly purporting to bind his personal representatives. In such a case does the husband's estate remain liable to continue making the payments so long as the wife is living and has not remarried? The leading authority on the subject is *Kirk v. Eustace*.<sup>14</sup> In that case the House of Lords had to construe a deed of separation whereby a husband covenanted to pay a weekly sum to a wife "during her life, on condition that and so long as she should continue to lead a chaste life". The language used was not found to show any intention that the husband's obligation was to continue only during his life and his estate was held liable to continue the payments. The decision relied to some degree on the provisions of section 80 of the Law of Property Act 1925 (U.K.)

<sup>12</sup> *Luscombe v. Luscombe* [1962] 1 All E.R. 668, 670.

<sup>13</sup> s. 36 Destitute Persons Act 1910; s. 26 (1) (a) Domestic Proceedings Act 1968.

<sup>14</sup> [1937] A.C. 491.

but it has been applied in New Zealand.<sup>15</sup> In every case the exact form of the words used and the whole of the document must be considered and even slight indications may sway the construction.<sup>16</sup> Different considerations may possibly apply according to whether the agreement is or is not contained in a deed.<sup>17</sup>

Even though, as a matter of construction, the agreement is found to bind the husband's estate, this is not necessarily the end of the matter. If the marriage has been dissolved, the personal representative may apply to the Supreme Court to have the agreement cancelled or varied.<sup>18</sup> If the marriage subsisted until death, it may be possible for the estate to obtain relief from its liability if the agreement has been or can be registered in the office of a Magistrate's Court. In future the position will be governed by the provisions of the Domestic Proceedings Act 1968 and it remains to be seen how they will be applied by the Courts. Section 55 (2) of that Act provides, in general terms, that a registered maintenance agreement, while it continues in force, is to have the same force and effect as if it were a maintenance order made under that Act on the date of registration and the provisions of the Act relating to maintenance orders are to apply accordingly with the necessary modifications. Section 85 (3) empowers a Magistrate's Court to vary, extend, suspend or cancel a registered maintenance agreement. In the absence of any express provision to the contrary, this jurisdiction would seem to extend to the variation or cancellation of a registered agreement which continues to bind the husband's estate after his death, even though proceedings cannot be taken under the Act for enforcement of the agreement (except in respect of money owing at the date of death) after the death of the person liable.<sup>19</sup> If, however, the agreement has not been registered in the husband's lifetime, the further question will arise whether it can be registered after his death for the purpose of having it varied. Section 55 (1) of the last mentioned Act provides that "either party" to a maintenance agreement may register the agreement. Section 56 provides that registration is to be set aside or may be cancelled if the agreement was not in force at the time of registration or has ceased to be in force. An agreement which continues to bind the husband's personal representative would, however, still be in force and the answer may depend on whether the personal representative is to be regarded as a "party" to the agreement.

*Maintenance Orders in Divorce:* As in the case of agreements, so in the case of orders made in divorce, a question may arise whether the order continues to bind the husband's estate. Again this is primarily a matter of construction; but different considerations may apply according to the date at which the order was made.

Until 1 January 1954, when the Divorce and Matrimonial Causes Amendment Act 1953 came into force, the jurisdiction conferred by section 33 of the Divorce and Matrimonial Causes Act 1928 to order periodical payments for maintenance (as contrasted with the securing

15 *In re Bayly* [1944] N.Z.L.R. 868; *Armstrong v. Public Trustee* [1953] N.Z.L.R. 1042.

16 *Nicol v. Nicol* (1886) 31 Ch. D. 524; *Re Lindrea* (1913) 109 L.T. 623; *Re Gilling* (1905) 92 L.T. 533; *Langstone v. Hayes* [1946] K.B. 109.

17 *Covell v. Sweetland* [1968] 2 All E.R. 1016, 1019.

18 s. 79 (1A) Matrimonial Proceedings Act 1963 as inserted by s. 11 Matrimonial Proceedings Amendment Act 1968.

19 s. 59 Domestic Proceedings Act 1968.

of maintenance) was confined to an order for the joint lives. It was, however, not uncommon for orders to be made beyond the joint lives by consent, and, unfortunately, consent orders were not always explicit as to the intended duration. This sort of situation was considered by the English Court of Appeal in *Hinde v. Hinde*.<sup>20</sup> In that case a decree absolute had been made containing an order by consent that the husband pay or cause to be paid periodical maintenance to the wife until remarriage. It was held, in the absence of evidence that the order merely embodied or evidenced terms agreed between the parties, that it must be treated as having been made under the powers conferred on the Court by the statute; and as the statutory jurisdiction was limited to an order for payments during the joint lives, the order, to have validity as such, was to be construed as made for the joint lives.

Section 12 of the Divorce and Matrimonial Causes Amendment Act 1953 amended section 33 of the principal Act so as to enable the Supreme Court to order that the husband or his personal representatives should pay to the wife for any term not exceeding her life a monthly or weekly sum for her maintenance. Section 33, as amended, provided that "every such order made against the husband" should be enforceable against his personal representatives after his death (though this was subject to the power of the Court to discharge, modify, suspend or vary the order). The section remained in this form until 1 January 1965 when the Matrimonial Proceedings Act 1963 came into force. Orders made between 1 January 1954 and 1 January 1965, therefore, have to be construed in the light of the statutory provisions then operating. At first sight these would appear to have had the effect of declaring that an order for periodical payments made against the husband for a term not exceeding the wife's life would be enforceable against the husband's personal representatives. The amended section was, however, minutely scrutinised by F. B. Adams J. in *Black v. Black*.<sup>21</sup> The learned Judge concluded that it was to be construed as meaning that the order might be made, either against the husband alone, or against him and his personal representatives, but, not originally, the husband being dead, against the personal representatives alone; and he thought that the words "every such order made against the husband" meant "every order purporting to bind the husband or his personal representatives". It would appear, therefore, that orders made under the amended section 33 did not necessarily bind the husband's estate; but that, where the order (whether or not made by consent) was not clear as to its duration, it could more readily be construed as binding the husband's personal representative than would have been so in the case of an order made before 1 January 1954.

As from 1 January 1965 the Court's jurisdiction in divorce to make an order against a husband for periodical payments is conferred by section 40 of the Matrimonial Proceedings Act 1963. This carefully phrased section enables the Supreme Court, on or at any time after making the decree (so long as the wife has not remarried), to order the husband or his personal representative or the husband and his personal representative to pay to the wife for any term not exceeding her life a periodical sum for her maintenance and support. An order which

20 [1953] 1 All E.R. 171; distinguished in *In re Hudson* [1966] Ch. 209.

21 [1960] N.Z.L.R. 630.

22 s. 13 Divorce and Matrimonial Causes Amendment Act 1953; ss. 40 and 47 Matrimonial Proceedings Act 1963.

has express regard to the distinctions so clearly made in the section should leave the personal representative in no doubt as to its effect.

The extension of the jurisdiction of the Supreme Court to the making of orders beyond the joint lives of the parties was accompanied by other provisions which created further problems for the husband's personal representative. By stages, commencing with the Divorce and Matrimonial Causes Amendment Act 1953 and continuing with the Matrimonial Proceedings Act 1963, an entirely novel situation was created. In the final result, not only could an order be made in the husband's lifetime to bind his estate, but his estate could become bound, for the first time, after his death. This could happen either by way of extension of an order made initially for the joint lives only or by an order made directly against the personal representative. Furthermore, the Court was empowered to vary any order extending beyond the joint lives, whether it was made in the husband's lifetime or after his death.<sup>22</sup>

A liability could thus be placed upon a deceased person's estate which did not exist in his lifetime. Not only was this liability one in the nature of a debt, but, in the case of periodical payments, it was for an amount not capable of exact estimation.

A personal representative liable to meet continuing maintenance was faced with a number of questions. How was such a liability to be dealt with as a matter of administration? Was it a debt ranking equally with other debts? If so, could the personal representative safely pay other creditors without knowing the full extent of the liability which arose or might arise by order of the Court? Did the incidence fall, as between the beneficial interests, in the same way as ordinary debts? However the incidence fell, would the personal representative be safe in distributing any part of the estate, unless he were able to set aside a fund sufficient, in all possible circumstances, to provide for such maintenance as might, from time to time, be ordered to be paid to the former wife? Neither the Divorce and Matrimonial Causes Amendment Act 1953 nor the Matrimonial Proceedings Act 1963, as originally enacted, provided any answer to those questions.

This omission has now been repaired by elaborate provisions contained in sections 9 and 10 of the Matrimonial Proceedings Amendment Act 1968. In broad effect, a periodical sum to be paid under an order in respect of any period after the husband's death is now declared to constitute a debt; but one ranking below other debts. This, however, is not to prejudice any security given pursuant to an order of the Court or to restrict the power of the Court to vary, suspend or discharge the order for maintenance. Provision is made to meet the case where there may be more than one order. Subject to any specific directions in a will and subject to any order for security, the incidence, as between the assets of the estate, is to fall primarily in the same way as would the incidence of the deceased's unsecured debts. The Court may, however, fix or vary that incidence and may exonerate any part of the estate wholly or in part and may otherwise adjust the burden among the beneficiaries. It may make its order subject to such terms and conditions as it thinks fit and may subsequently vary it. Any capital sum which is ordered, after a deceased person's death, to be paid by his personal representative is in a similar position to periodical sums payable in respect of a period after the death; but different principles apply to capital payments ordered in the deceased person's lifetime (though payable after his death), and, as already mentioned, to periodical payments

in arrear at that person's death. These provisions have no application to a liability which arises solely out of a contractual agreement.

## PROPERTY RIGHTS IN DIVORCE

With the coming into operation of the Matrimonial Proceedings Act, the Supreme Court acquired an extended jurisdiction to make orders of various kinds in respect of the matrimonial home and furniture.<sup>23</sup> Of these, an order conferring a right of personal occupation of the home pursuant to section 57 and an order granting possession of furniture pursuant to section 62 (1) could be made after the husband's death against his personal representative. That Act was accompanied by another Act, the Matrimonial Property Act 1963, of altogether wider significance in relation to property rights. This now calls for consideration.

### THE MATRIMONIAL PROPERTY ACT 1963

The Matrimonial Property Act was enacted on the same day as the Matrimonial Proceedings Act and the sections thereof with which this article is concerned came into force on the same day as did the Matrimonial Proceedings Act.<sup>24</sup> It repealed section 19 of the Married Women's Property Act 1952<sup>25</sup> and in its place confers on the Supreme Court (and, within its prescribed jurisdiction, a Magistrate's Court) far-reaching powers to make orders with regard to the property of any person who has married. Section 5 provides that on an application concerning any question between husband and wife as to the title to or possession or disposition of property, the Court is empowered to make such order as it thinks fit with respect to the property in dispute. In general terms any order, whether affecting the title or otherwise, which appears just may be made, notwithstanding that the legal or equitable interests are defined and notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property. Certain types of orders are specifically mentioned in section 5 (2) of the Act; but these references do not limit the general jurisdiction.<sup>26</sup> In considering an application, the Court is required (in relation to a matrimonial home or the division of the proceeds of sale thereof) to have regard, and may (in other cases) have regard to the respective contributions of the hus-

<sup>23</sup> Part VIII Matrimonial Proceedings Act 1963.

<sup>24</sup> 1 January 1965. As to the inter-relationship between the two Acts, see *Pay v. Pay* [1968] N.Z.L.R. 140.

<sup>25</sup> This section had also related to questions between husband and wife as to the title to or possession of property; but on questions of title it was given a somewhat narrow construction. "There can be, I think, little doubt that the Matrimonial Property Act resulted from Parliament's dissatisfaction with the restricted operation which our Courts, following cases decided in England on similar language in the English Act, had imposed on s. 19 of the Married Women's Property Act 1952 and its predecessor in the 1908 Act. It had become well established, it will be recalled, by a long line of decided cases that s. 19 did not permit questions of title to or ownership of property to be decided except in accordance with the strict legal or equitable rights of the parties", per McCarthy J. in *Pay v. Pay* (*supra*) at p. 149. The corresponding section in the English Act, s. 17 of the Married Women's Property Act 1882, following pronounced differences of judicial opinion, has now been fully considered by the House of Lords in *Pettitt v. Pettitt* [1969] 2 W.L.R. 966.

<sup>26</sup> s. 4 Matrimonial Property Amendment Act 1968, which negates the view to the contrary which had been expressed in *L. v. L.* [1968] N.Z.L.R. 752, 758.

band and wife to the property in dispute, whether in the form of money payments, services, prudent management or otherwise howsoever.<sup>27</sup> The contributions need not be of money or even of an extraordinary nature.<sup>28</sup> Wrongful conduct, not related to the acquisition of the property in dispute or to its extent or value, is irrelevant.<sup>29</sup> There are certain curbs on the exercise of the jurisdiction. The Court is not to exercise its powers so as to defeat any common intention which it is satisfied was expressed by the husband and the wife;<sup>30</sup> and no order is to be made in respect of a joint family home after the date of death of either spouse if at that date the spouses were cohabiting.<sup>31</sup> The full significance of this legislation, in the present context, arises from the extended meanings given to the terms "husband" and "wife", which include the legal personal representatives of the husband or wife,<sup>32</sup> and now also include the parties to a former marriage and the parties to a purported marriage that is void.<sup>33</sup> A personal representative of a deceased husband or wife or of a deceased former husband or former wife<sup>34</sup> may, therefore, either initiate or be called upon to resist an application to the Court, and this even though both parties to the marriage may be dead.<sup>35</sup> The Act does not require the Court to have regard to the nature of the beneficial interests in the estate (or in either estate), and, in the existing state of the authorities, it would seem that the merits, equities or circumstances of the beneficiaries are not relevant.<sup>36</sup> The "common intention" which is not to be defeated is, it appears, one which must be applicable to the circumstances existing when the Court is required to exercise its discretion,<sup>37</sup> and in *Wacher v. Guardian Trust*<sup>38</sup> a common intention expressed on the acquisition of title was found not to be applicable in a situation where both parties had died at virtually the same time.

The jurisdiction of the Courts under the Matrimonial Property Act appears to be unaffected by any question of whether there has been a history of matrimonial discord, except insofar as that may be a factor affecting the common intention. On this account, a personal representative may face a difficult decision in considering whether, in certain circumstances, he should initiate an application. He may, for instance, represent a deceased wife who made substantial contributions by way of services and prudent management but had no legal estate in the matrimonial home. She may have left her estate (possibly at her husband's own suggestion) to (say) grandchildren who are orphans and minors. The Act gives no clear guidance to a personal representative in a situation of this sort.

The incidence of an order made under section 5 of the Matrimonial Property Act against the personal representatives of a deceased person

27 s. 6 (1).

28 s. 6 (1A) as inserted by s. 6 Matrimonial Property Amendment Act 1968.

29 s. 6 A as inserted by s. 7 Matrimonial Property Amendment Act 1968.

30 s. 6 (2) as amended by s. 6 (2) Matrimonial Property Amendment Act 1968.

31 s. 5 (6) as amended by s. 3 Matrimonial Property Amendment Act 1968.

32 As from 1 December 1961 this had also been the case in relation to s. 19 Married Women's Property Act 1952—see s. 2 Married Women's Property Amendment Act 1961.

33 s. 5 (7) as amended by s. 2 Matrimonial Property Amendment Act 1966.

34 *Morris v. Miles* [1967] N.Z.L.R. 650, 654.

35 *Re Ball* [1967] N.Z.L.R. 644; *Wacher v. Guardian Trust* [1969] N.Z.L.R. 283.

36 *Wacher v. Guardian Trust* (*supra*) at p. 288.

37 *West v. West* [1966] N.Z.L.R. 247, 250.

38 *Supra* at p. 287.



is dealt with by section 8A (as inserted by section 11 of the Matrimonial Property Amendment Act 1968). In brief, the incidence falls primarily on the property in respect of which it is made, but this may be adjusted otherwise by the Court. In making such an adjustment, the Court may, among other things, fix a periodical payment or lump sum to be paid by a beneficiary, to represent, or in commutation of, any liability that falls on the portion of the estate in which he is interested.

## EFFECT OF SEPARATION DECREE OR ORDER ON PROPERTY RIGHTS

Section 39 of the Divorce and Matrimonial Causes Act 1928, as amended by section 16 (5) of the Law Reform Act 1936, contained special provisions as to the effect of a decree of judicial separation on a restraint upon anticipation and on certain property rights. The section was not a model of lucidity; but it appears that, among other things, it had this effect, that, if during the continuance of the decree the wife died intestate, property which had been acquired by or had devolved upon her during the continuance of the decree would devolve as if the husband had predeceased her.

Section 18 (2) of the Destitute Persons Act 1910, as originally enacted, provided that a separation order made under that Act, while it remained in force, was to have the effect in all respects of a decree of judicial separation on the ground of cruelty under the provisions of Part I of the Divorce and Matrimonial Causes Act 1908. The effect of this was somewhat obscure, for Part I of the last mentioned Act did not ascribe to a decree made on the ground of cruelty any effect which a decree made on any other ground did not also have.<sup>39</sup> Over the years the section has become even more uncertain in its application, since the provisions of Part I of the Divorce and Matrimonial Causes Act 1908 dealing with the effect of a decree of judicial separation on property rights were replaced first by provisions in somewhat different terms contained in Part IV of the Divorce and Matrimonial Causes Act 1928 and then by provisions in substantially different terms contained in Part III of the Matrimonial Proceedings Act 1963. It is, therefore, small wonder that practitioners, when faced with the problem, have found difficulty in satisfying themselves as to the effect of a separation order made under the Destitute Persons Act on succession in intestate estates.

Section 12 of the Matrimonial Proceedings Act 1963, while retaining the previous provisions as to the effect of a decree of separation on a restraint on anticipation, has made a fresh approach to the effect of such a decree on rights of succession on intestacy. In this respect, no distinction is made between a husband and a wife, and the section states in clear terms that, if, while a decree of separation is in force, either the husband or the wife dies intestate as to any property, that property is to devolve as if the survivor had predeceased the intestate. The surviving spouse is, however, given the right to apply to the Court for provision from the estate, and the provisions of the Family Protection Act, so far as applicable and with the necessary modifications, are to apply with respect to such an application.

<sup>39</sup> As to the historical background of s. 18 (2) Destitute Persons Act, see *Harriman v. Harriman* [1909] P. 123.

This has clarified the position in the estate of a person separated by a Supreme Court decree who has died intestate after the coming into operation of the Matrimonial Proceedings Act 1963. But the position in the estate of a wife, separated by a Magistrate's order, who has died intestate before 1 January 1965, and in the estate of a person (whether a husband or a wife), separated by a Magistrate's order, who has died intestate on or after 1 January 1965 and before the coming into operation of the Domestic Proceedings Act 1968 on 1 January 1970, will still call for careful examination.

The position in the estates of persons separated by a Magistrate's order who die on or after 1 January 1970, will be clarified, for subsections (1), (2) and (3) of section 24 of the Domestic Proceedings Act 1968 are in terms of substantial uniformity with the corresponding subsections of section 12 of the Matrimonial Proceedings Act.

Again a much needed reform has been effected; but personal representatives may meet a practical difficulty in determining whether a decree or order remains in force.<sup>40</sup>

It is also to be noted that Part V of the Domestic Proceedings Act 1968 contains certain provisions enabling a Magistrate's Court to make orders relating to the occupation and possession of a matrimonial home and furniture.

## PROTECTION TO PERSONAL REPRESENTATIVES

All practitioners engaged in the administration of deceased estates will be familiar with the measures designed by the legislature to prevent undue interference with the rights of beneficiaries by reason of the possibility of applications being made under the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949. This purpose was attained by imposing limitation periods and also by the enactment in 1960 of section 30A of the Administration Act 1952 enabling a personal representative to make distributions before the expiration of the limitation period without risk to himself if the requirements of that section have been satisfied.

Similar measures have been taken to alleviate the impact of the matrimonial legislation.

Limitation periods have been imposed in many respects in relation to proceedings against a personal representative.<sup>41</sup> Generally speaking, the limitation period is twelve months after the date of the grant in New Zealand of administration in the estate of the deceased person; and there is provision enabling the Court to extend the time for making application in certain circumstances. It is to be noted, however, that, in respect of an application under the Matrimonial Property Act made after a marriage has been dissolved otherwise than by death (or after a decree of nullity has been made), the limitation period is twelve months after the date of the sealing of the decree absolute (or the decree of nullity), irrespective of whether either or both of the parties may have died.

In addition, the provisions of section 30 A of the Administration Act

<sup>40</sup> ss. 15 and 26 Matrimonial Proceedings Act 1963; s. 21 Domestic Proceedings Act 1968.

<sup>41</sup> ss. 12 (3), 42, 47 (7) and 62 A (as inserted by s. 8 Matrimonial Proceedings Amendment Act 1968) of the Matrimonial Proceedings Act 1963; s. 5 A Matrimonial Property Act 1963 (as inserted by s. 5 Matrimonial Property Amendment Act 1968); s. 24 (3) Domestic Proceedings Act 1968.

1952 have been extended to apply to many of the applications and orders which can be made under the matrimonial legislation against a personal representative.<sup>42</sup>

### CONCLUSION

There can be no doubt that the matrimonial legislation of recent years has written a fresh chapter into the law of administration. As was inevitable in the introduction of so many bold and novel conceptions, it has raised new problems and placed additional burdens and responsibilities on personal representatives and their legal advisers. On the credit side, it has removed many anomalies and obscurities, and has provided an efficient working system to minimise administrative difficulties and avoid undue delay in distribution.

42 s. 89 (2) Matrimonial Proceedings Act 1963; s. 8 (2) Matrimonial Proceedings Amendment Act 1968; s. 8 Matrimonial Property Amendment Act 1968; First Schedule to the Domestic Proceedings Act 1968.