Thus any trustee who is empowered or directed to pay income to the parent or guardian of any minor, or to apply it for the maintenance, education, advancement, or benefit of any minor, has the power to pay it to that person when he attains the age of 20 years.

Ainsley Elliott

FAMILY LAW

Interrogatories

The Court of Appeal in *A.* v. *A. and Another* [1970] N.Z.L.R. 1054, in approving the recent decisions in *S.* v. *S.* [1968] N.Z.L.R. 698 and *C.* v. *C.* [1969] N.Z.L.R. 852, appears to have firmly established in New Zealand the general practice in divorce proceedings of disallowing leave to administer interrogatories where the answers will or may tend to prove the adultery alleged. The Court held that the rules of the Code of Civil Procedure as to interrogatories, as applied by R. 68 of the Matrimonial Proceedings Rules 1964, must be read subject to the Matrimonial Proceedings Act 1963 and to established divorce practice. As section 69 of this Act neither expressly nor impliedly indicates an intention to relax in interlocutory proceedings the protection which that section gives to witnesses, and as no other valid reason for any relaxation had been advanced to the Court, the appeal, from a decision of Roper J. refusing an application for leave to administer interrogatories, was dismissed.

Assessment of Damages

The case of *Warren* v. *Fry and Another* [1970] N.Z.L.R. 781 concerned an appeal from a judgment of Roper J. awarding $1,500 damages against the appellant as co-respondent in a divorce petition brought by the husband. The Court of Appeal held that the main principles of assessment had been correctly stated by Roper J. but that in the circumstances of the case the actual amount awarded was excessive. The Court attached most weight to the fact that the marriage was a comparatively short and unhappy one: the husband and the wife were married in March 1964, they entered into a separation agreement in December 1968, and the husband was granted a decree nisi in March 1969, his petition being based upon his wife's adultery with the appellant. Thus small damages only could be awarded for the loss of consortium.

Wild C.J. accepted the words of Scarman J. in *Pritchard* v. *Pritchard* [1967] P. 195, as laying down the principles to be considered with regard to the amount of damages as compensation for injury to the husband's feelings and pride:

> The sum must be reasonable so that the solatium offered is no mere empty show. It is to be a genuine balm to injured feeling, yet it must be modest; it is not intended as punitive or exemplary, and cannot, however large or small, ever pretend to reflect accurately the injury inflicted (*ibid.*, 216).

In the present case too much emphasis was attached by the Judge at first instance to the prospect of reconciliation running right up to the hearing for damages; such a prospect disappeared upon the appellant's petitioning for divorce some six months previously, the Court of Appeal held.

Finally, it should be remembered in assessing the quantum of damages that the fundamental factor is the question of whether the co-respondent caused the break-up of the marriage. In the present case a separation agreement had been entered into prior to the appearance of the co-respondent. On these grounds the Court of Appeal unanimously vacated the award of damages in the Court below and substituted an award of $750.

Condonation

The facts in *Ford* v. *Ford and Stanford* [1970] 3 All E.R. 188 differ from those normally to be found in cases where it is claimed condonation operates as a bar to the granting of a divorce. The husband, who petitioned for a decree of divorce on the ground of his wife's adultery, was an epileptic and had a crippled arm and leg. The frequency of sexual intercourse gradually diminished and by 1965 had ceased permanently. In February 1967 the wife began to associate with a man and she became pregnant. However, on the birth of the child the husband offered to forgive the wife and to accept the child as the child of the family.

The husband had not condoned the wife's adultery, it was held by Lane J., because forgiveness should have been mutual and here, although the husband had been willing after the birth of the child to forgive the wife, and had hoped for a full reconciliation, the wife had not wished to be forgiven. Further, applying the dictum of Lord Pearce in *Blyth* v. *Blyth* [1966] 2 W.L.R. 634, there was no resumption of matrimonial cohabitation, for the husband continued to share the matrimonial bed and accept wifely services only because of his inability, having regard to his condition, to see a way out of his difficulties which another abler man would have been able to find.

Maintenance of a Guilty Spouse

In *Milliken-Smith* v. *Milliken-Smith* [1970] 1 W.L.R. 973 the husband had obtained a divorce on the ground of his wife's adultery and the wife had been granted custody of the two children. Ormrod J. in the Court below had ordered £5 a week maintenance for each child and £10 a week for the wife. The husband appealed against this latter figure which, he claimed, ought to have been £3 a week.

The principles to be followed in making a maintenance order in New Zealand are found in section 43 of the Matrimonial Proceedings Act 1963, which provides that the Court shall have regard, inter alia, to "The ability of the wife, . . . if she has dependent children, to support herself without working." The English principles are laid down in the Matrimonial Causes Act 1965 (U.K.) and direct the court to consider, in general, similar factors. In the present case both Harman and Russell L.JJ. were unanimous in holding that, in view of the financial circumstances and the fact that the wife had a home of her own, the amount should be £7-10-0. Harman L.J. felt that £10 a week had been ordered in the Court below on the basis that this is what it would have cost the husband to employ a housekeeper if the wife had not been there. Both the learned Judges were of the opinion, expressed by Russell L.J. that "there must be provided a bare minimum to sustain the wife, not as payment for looking after the children, but indirectly as in effect contributing to the maintenance of the children." (*ibid.*, 977 C).

Matrimonial Property

"Some features of family law are elemental in our society. One is that it is the husband's duty to provide his wife with a roof over her head: and the children too. So long as the wife behaves herself, she is entitled to remain in the matrimonial home": *Gurasz* v. *Gurasz* [1970] P. 11 per Lord Denning M.R. In *Gurasz* v. *Gurasz* the English Court of Appeal had cause to consider, in relation to the Matrimonial Homes Act 1967 (U.K.), the position of a wife who owned the matrimonial home jointly with her husband. It was held unanimously that the Act of 1967 only protected a wife who had no proprietary, contractual or statutory right to remain in the matrimonial home, but that, as in the case before the Court, where a wife owned the property jointly with her husband, a wife has at common law a right against her husband to occupy the matrimonial home.

In so holding, the Master of the Rolls reiterated in clear terms the precise nature of this right (*ibid.*, 16). The right is a personal right belonging to a wife as an incident of consortium and is thus available only against the husband, not against third persons. No matter whether the property is owned jointly or by either husband or wife, if the wife has done nothing to forfeit that right, the court will enforce it by making an injunction to restrain the husband from interfering with the exercise of it. Since *National Provincial Bank* v. *Ainsworth* [1965] A.C. 1175 a deserted wife has had no protection against third persons who buy from the husband (see however, Matrimonial Homes Act 1967 (U.K.)), but from the House of Lords down the courts have recognised this personal right of the wife as against her husband.

Family Agreements

Since *Balfour* v. *Balfour* [1919] 2 K.B. 571 it has been accepted that there is a strong presumption that in agreements between close relatives, and more particularly between husband and wife, the parties to such agreements do not intend to create legal relations (viz., *Gould* v. *Gould* [1969] 3 W.L.R. 490; *Jones* v. *Padavatton* [1969] 1 W.L.R. 328).

In *Merritt* v. *Merritt* [1970] 1 W.L.R. 1211, the husband had become attached to another woman and had left the matrimonial home to live with her. During a subsequent meeting with his wife he signed and dated an agreement which stated: "In consideration of the fact that you will pay all charges in connection with the house . . . until such time as the mortgage repayment has been completed, when the mortgage has been completed I will agree to transfer the property in to your sole ownership." When the mortgage was paid off the husband refused to transfer the house to the wife.

The English Court of Appeal, in dismissing the appeal, held that this agreement was intended to create legal relations between the parties. In deciding whether or not an agreement is intended to establish legal relations the surrounding circumstances must be looked at to see whether reasonable people would regard the agreement as intended to be binding. The presumption against such intention is one of fact, not of law, it was held, and where arrangements are made between a husband and wife when they are not living in amity and are separated or about to separate, there is no presumption against the creation of such legal relations.

J. R. Laidlaw