MATRIMONIAL PROPERTY

Report of a Special Committee

PRESENTED TO THE MINISTER OF JUSTICE IN JUNE 1972

MATERIAL
PROPERTY

REPORT ON THE MATRIMONIAL PROPERTY ACT 1963

INTRODUCTION

1. In 1969 the New Zealand Law Society made representations to the then Minister of Justice, the Hon. J.R. Hanan, relating to the effect of insolvency on the rights of spouses under the Matrimonial Property Act 1963. In acknowledging these representations the Minister raised a number of other points of doubt affecting the Act and suggested that these various matters might be discussed between the Law Society and the Department of Justice. The New Zealand Law Society accordingly nominated Mr S.C. Ennor of Auckland and Mr A. Hearn of Christchurch, the departmental officers taking part in the examination of the Act being Mr B.J. Cameron, now Deputy Secretary for Justice, and Mr R.G.F. Barker, Legal Adviser. We have acted as a committee rather than as two separate parties, and this report carries the agreement of us all.

2. In the course of our consideration of these problems a number of other difficulties and uncertainties came to our notice. We ascertained that your predecessor did not regard us as being limited to the specific matters mentioned in the 1969 correspondence, but as having a brief to make such recommendations for changes in the law relating to matrimonial property generally as we consider desirable. After we had reached some provisional conclusions, the judgment of the Court of Appeal in E. v. E. [1971] N.Z.L.R. 859 was delivered, raising some basic questions about the nature and scope of matrimonial property in New Zealand and making the need for a revision and clarification of the law even more urgent.

BASIC RECOMMENDATION.

3. Our principal recommendation may be stated immediately. We are satisfied that there is need to enact as soon as possible a single, clear and comprehensive statute to regulate matrimonial property in New Zealand. The Matrimonial Property Act 1963 has already been much

amended; there are several illogical differences between the Act and Part VIII of the Matrimonial Proceedings Act 1963; there remain a number of internal anomalies and defects; and further attempts at piecemeal amendments are likely to compound rather than resolve these difficulties. Furthermore, the 1963 Act was tentative in policy and was in form engrafted upon a primarily procedural section of the Married Women's Property Act 1952, first enacted in 1884. We believe that public and professional opinion has moved a considerable distance since 1963, and that the time has come for a coherent and rational code on this most important subject of the property relations between husband and wife.

HISTORY

4. We do not intend in this report to embark on a detailed historical dissertation upon matrimonial property law in England or New Zealand, or to examine the comparative law of the subject. But a brief account of its history may be useful in understanding how the law in this country took its present form.

5. We start with the Married Women's Property Act 1884, which was enacted two years after the almost identical English Act of the same name. The primary object of this legislation was to remove most of the serious legal disabilities that then attached to married women. It was not the first such legislation in either country, being preceded in New Zealand by the Married Women's Property Protection Acts of 1860 and 1870, but it was far more comprehensive than these. The approach adopted was to extend the equitable doctrine of a married woman's separate estate to all her property. A married woman became capable of acquiring, holding, and disposing (by deed, will or otherwise) of any real or personal property as her separate estate, of entering into and rendering herself liable in respect and to the extent of her

separate property on any contract, and of suing and being sued, in all respects as if she were a single woman.

6. What the 1884 Act did, then, in essence was to treat husband and wife virtually as strangers for property purposes. It did not remove every inequality, leaving untouched for example the rules as to restraint upon anticipation, and some of these inequalities remained until the passing of the Law Reform Act 1936. There remained, too, certain special rules such as the presumption of advancement, and, of course, on the death of one spouse intestate the surviving spouse is entitled to a statutory share in the estate of the deceased. Nevertheless, the general principle was as we have stated it. After 1884 the law looked at matrimonial property as his or hers, seldom and reluctantly as theirs.

7. The Act was a major reform and, at least in theory, represented a big step in the emancipation of married women. Nevertheless, it did little for the ordinary married woman without independent means, who remained at home and performed the ordinary tasks of a wife and mother. In many cases she had little or no property to which the Married Women's Property Act could apply, and in particular she seldom had any interest or security in the family home. That home was the husband's, since he had paid for it, and for many years most people generally assumed that he was able to mortgage, sell or dispose of it at will unless he had chosen to settle it on himself and his wife jointly.(1)

8. An important development occurred in England after the last war when, because of the extreme shortage of housing, the importance of the particular family home increased. The Courts there began using s.17 of the Married Women's Property Act (s.19 of the New Zealand Act of 1952) to make orders affecting the home in favour

(1) In New Zealand the joint ownership of property was discouraged by the existence of gift duty which placed a substantial penalty on such settlements.

of a wife contrary to the strict legal or equitable ownership. The Courts also recognised the equity of a deserted wife in a matrimonial home. The leading cases were Rimmer v. Rimmer (1952) 2 All E.R. 863 and Bendall v. McWhirter (1952) 1 All E.R. 1307 respectively. The Courts in New Zealand followed these innovations cautiously, (e.g. Masters v. Masters [1954] N.Z.L.R. 82, Reeves v. Reeves [1958] N.Z.L.R. 317), but they interpreted s.19 to mean that only an order for possession might be made contrary to the ordinary rules of legal ownership. No order under the Act could affect title.

9. Meanwhile a significant new social policy was embodied in the Joint Family Homes Act 1950, now represented by the Joint Family Homes Act 1964. This had the deliberate object of strengthening the family bond and recognising the common interest of husband and wife in the family home. Originally there was a value limitation, but that was subsequently removed, and the position now is that any home occupied exclusively or principally as a residence by a husband and wife may be settled under the Joint Family Homes Act. There are certain reliefs from gift and estate duty, and after a period of two years the home is protected from unsecured creditors up to the amount of $8,000.(1) On the death of the first spouse the home passes automatically to the other; if the marriage breaks up the interests of the spouses may be determined under the Matrimonial Property Act 1963.

10. This legislation has proved most popular.(2) It seems satisfactory as long as the couple continue to reside in the particular house that has been settled, but once joint ownership ends, the settlement is cancelled, the home reverts to the original settlor, and any new

(1) A special procedure involving the advertising of the application gives protection after a shorter period, but it is seldom resorted to.

(2) An average of 14,000 homes have been settled under the Act in recent years.

house that is acquired as a family home must be separately settled. This seems anomalous and can give rise to injustice. Although the wife's consent is required to the cancellation of the settlement, she may give it unaware that the whole of the proceeds of sale will be payable to her husband. Although she can trace her interest in the home to the proceeds of sale, if the husband dissipates those funds the wife's interest may well be lost.(1)

11. In 1951 and 1953 legislation provided for the transfer of tenancies in homes on divorce and separation.(2) These enactments, coupled with special provisions in the Tenancy Act 1948, gave a divorced or deserted wife a considerable degree of protection where the home was rented. However the Law Revision Committee, which recommended these changes, was unwilling to extend its reasoning to owner-occupied homes, which then (as now) represented well over half the total number of occupied dwellings in New Zealand. Ownership by virtue of the traditional canons was apparently considered sacrosanct.

12. It is against this background that the 1963 reforms should be seen. On the instructions of the Minister of

(1) The rule that on cancellation the home reverts to the original settlor appears to work particularly harshly where the settlor becomes bankrupt prior to the cancellation. Since upon the cancellation of the settlement the home or the proceeds of its sale vest in the settlor, he always retains a contingent interest in the full value of the property. It has been argued that, notwithstanding the provisions of the Joint Family Homes Act, this contingent interest passes to the Official Assignee as soon as it crystallises, and therefore once the settlement is cancelled the Official Assignee has a right to the full value of the property, even though the bankrupt settlor may have already obtained his discharge. If this argument is sound, it would appear that the manifest intention and spirit of the Joint Family Homes Act will be frustrated in such cases.

(2) Destitute Persons Amendment Act 1951, s.3; Divorce and Matrimonial Causes Act 1953, s.14.

Justice departmental officers had been working on new divorce legislation since 1958 in collaboration with legal practitioners nominated by the New Zealand Law Society. One of their principal objects was to see legislative recognition of the importance of the matrimonial home and to provide for its disposition on a just and equitable footing where the marriage broke up. In the draft Matrimonial Proceedings Bill detailed provisions were made for possession orders, for orders converting sole or joint ownership into common ownership, for sale or division of the proceeds and so on. The supposed equity of the deserted wife in the matrimonial home was abolished. These provisions are represented by Part VIII of the Matrimonial Proceedings Act 1963.

13. The original intention was to have a similar procedure where a separation order was made in the Magistrate's Court. However, the passage of new domestic proceedings legislation was seen to be some time off and the then Minister of Justice wished provision applying to separation to be made without delay. The result was the much more direct and general approach of s.5 et seq of the Matrimonial Property Act, which was modelled on s.3 of the Marriage (Property) Act 1962 of the State of Victoria. What the Matrimonial Property Act did was to extend s.19 of the Married Women's Property Act 1952 by giving the Court an express power to make orders affecting the title to as well as the possession of property, irrespective of the quantum of the applicant's legal or equitable interest and notwithstanding that he (or more usually she) had no such interest at all. The Act borrowed the concept of contribution from Part VIII. One most important feature was that following an amendment made to the Married Women's Property Act in 1961 "husband" and "wife" were defined to include their personal representatives. The effect was that the 1963 Act applied and still applies not merely during the subsistance of the marriage, but following death.

14. The Matrimonial Property Act did not fit at all well with Part VIII of the Matrimonial Proceedings Act and subsequent amendments have tended to increase rather than diminish the conflict. It represented a more recent stratum of thinking and it is significant that most subsequent amendments have been to this Act rather than to Part VIII. We do not think it necessary to go into these differences in detail. One is the effect of conduct, which under Part VIII is regarded as relevant although not specifically referred to. Under the Matrimonial Property Act as amended in 1968 wrongful conduct is not to be taken into account in determining the amount of the share of the spouses, except to the extent that it is related to the acquisition of the property in dispute or its extent or value.

15. A number of questions soon arose as to the scope and interpretation of the Matrimonial Property Act, and amendments made in 1966 and 1968 attempted to settle some of these:

(a) The 1966 amendment provided that the Act should apply on divorce as well as during the subsistence of the marriage. The area of overlap between this Act and Part VIII was thus substantially increased.

(b) The 1968 Act introduced limitation periods for claims following divorce and following death.

(c) The 1968 Act declared that an order might be made in favour of a spouse notwithstanding that he or she made no contributions in the form of money payments, and (more importantly) notwithstanding that contribution made in any other form was of a usual and not an extraordinary character. The ordinary performance of domestic services was to suffice.

We regard this as a significant clarification by Parliament of the policy of the Act and this is fortified by reference to the speech of the Minister of Justice introducing the second reading debate. Although what is said in Parliamentary debates cannot be used by the Courts in construing an Act, we do not feel that in our task we need ignore it.

> "I should like to quote from something that was said in England not long ago by Sir Jocelyn Simon, President of the Probate Division of the High Court: (1)
>
> > 'In the generality of marriages the wife bears the children and minds the home. She thereby frees her husband for his economic activities. Since it is her performance of her function which enables the husband to perform his, she is in justice entitled to share in its fruits ...'
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> This is the spirit in which our Matrimonial Property Act was conceived, and the principle that animates it is given better effect by the present amendment." (2)

(d) As we have seen, the 1968 amendment dealt with the vexed question of conduct by providing (along the lines of the 1962 Victorian Act) that wrongful conduct was not to be taken into account in determining the quantum of an interest unless that conduct was related to the acquisition, extent or value of the interest. This does not however affect the power of the Court to take conduct into account in

(1) Now Lord Simon of Glaisdale.
(2) 358 N.Z. Parliamentary Debates 3393.

determining the form of the actual order. Having, for example, determined the share of a wife the Court may if it thinks proper postpone its vesting.

THE PURPOSE OF MATRIMONIAL PROPERTY LEGISLATION

16. Several views are possible of the principles on which matrimonial property law in New Zealand should be founded. In our opinion, however, we ought not to approach this question without regard to the trend of existing legislation both here and overseas. Of the position in other countries we content ourselves with drawing attention to the way in which recent changes and proposed changes are bringing various matrimonial property regimes closer together.(1) There is an increasing consensus overseas first as to the concept of the spouses' assets as a joint possession, second as to equality of rights in respect of these assets, and third as to separate administration of assets during the subsistence of the marriage. In particular the special character of the matrimonial home as the joint possession of the spouses is recognised almost everywhere.

SCOPE OF MATRIMONIAL PROPERTY

17. This is the first question which anyone seeking to reform matrimonial property law in New Zealand must answer. Indeed, an answer has been made imperative by the recent decision of the Court of Appeal in E. v. E.

(1) Proposed new legislation in Sweden is to some extent an exception - ironically when the laws of other countries are approximating to the existing Scandinavian law the movement in Sweden is towards a greater degree of separation of property in conformity with a greater emphasis on marriage as a voluntary cohabitation: see (1971) 20 I.C.L.R. 223. In England the trend is the other way: see the Law Commission's Working Paper No. 42, entitled Family Property Law.

[1971] N.Z.L.R. 859. In that case, among other things, the Court held that s.5 of the Matrimonial Property Act was concerned solely with the determination of disputes relating to specific and identifiable item of property and did not create any principle of "community of surplus". The Court did recognise the analogy of the tracing order, so that a contribution once made can be followed through various transformations, but further than that the majority were not prepared to go. The spouse who brings an application under the Act must accept the burden of proving that he or she made a contribution to the particular asset, and this inevitably places her in an inferior bargaining position in any negotiations.

18. While this decision may well be justified in terms of the Act, we think its result is open to criticism as artificial, unreal, and often unlikely to produce results that would be recognised as just. From the point of view both of spouses and of practitioners advising them we believe that there is much to be said for the views of Sir Richard Wild, C.J., in his dissenting judgment. Practitioners who have to advise their clients on possible claims under the Act know that it is not always possible to assign a contribution to a specific asset, at least where that asset is other than the matrimonial home or its contents. Indeed, the Court of Appeal seems to have applied the Act in a fashion in which practitioners had seldom applied it. Law and practice should surely be less estranged than this.

19. Nor, regarding it in terms of social principle, does the decision agree well with the contemporary view of marriage as being in some sense a partnership to which each contributes according to his or her capacity. To quote Lord Simon:

> "Men can only earn their incomes and accumulate capital by virtue of the division of labour between themselves and their wives. The wife spends her youth and early middle age in bearing and rearing children and in tending the home; the husband is thus freed for his economic activities. Unless the wife plays

> her part the husband cannot play his. The cock bird can feather his nest precisely because he is not required to spend most of his time sitting in it." (1)

20. This may have a slightly old-fashioned ring in these days of Women's Liberation, but nonetheless we consider that it expresses the reality of most New Zealand families today,(2) and we suggest that this concept should lie at the heart of any matrimonial property legislation in this country.

21. There are further disadvantages in an approach that looks solely at specific and identified pieces of property. One occurs where an application under the Act is made against the estate of a deceased spouse. The division of a specific asset then may cause undue prejudice to a beneficiary to whom that asset is given. This was recognised and dealt with by Parliament in s.11 of the 1968 Act. This section, inserting a new s.8A in the Matrimonial Property Act 1963, allows the Court to vary the incidence of orders against personal representatives, and itself goes some way towards accepting the concept of the marriage assets. A second disadvantage is that if, as happened in Thomson v. Thomson [1968] N.Z.L.R. 504, property to which a contribution has been made is dissipated by the other spouse without any equivalent asset being acquired, the claim must at present fail under the principle laid down in E. v. E.

22. We therefore consider that the property which may potentially be subject to a claim should comprise all the assets of the marriage, by which we mean, (a) all property acquired in contemplation of the marriage by

(1) Presidential Address to the Holdsworth Club 1964.

(2) The 1966 Census showed that only 19.9% of married women were employed in the labour force.

either party, and (b) all property acquired since the marriage by either party otherwise than by gift or inheritance from third parties (except for a gift made with the intention of benefiting both parties) and (c) any accretion during the marriage in the value of previously owned property. The concept of contribution should be related to the marriage assets in general, although special attention ought to be paid to the matrimonial home.

23. This definition is a very wide one and we are far from saying that all the property embraced within it will necessarily in a particular case be brought within the common pool and distributed. However we think that any narrower definition would be difficult to devise and could give rise to acute problems of interpretation. It would be almost certain in some cases to leave out some property that could properly be described in the particular case as part of the marriage assets. The result of the approach we favour would be to relate the contribution to the marriage assets generally, which again is not to say that specific contributions to particular property should be ignored. In the words of Wild C.J. in E. v. E. "this of course is not to say that [the Judge] can ignore evidence as to particular items of property if it is given. Nor must he forget that contributions to which regard is had must be contributions to the property in dispute".

24. In our opinion the notion of contribution, at least in the form in which it has been defined since 1968, is reasonably satisfactory for the purposes of matrimonial property legislation, and we do not see any present need to alter it in substance. We point out, however, that under the present Act the Court "shall" have regard to contributions where the application is in respect of the matrimonial home and "may" have regard to contributions in other cases. We can see no reason for this distinction

and consider that the Court should be required to have regard to the contribution of the spouses in all cases. The claim has been made,[1] on the basis of an analysis of cases in one centre, that in practice amounts awarded a wife on her application have often been inadequate and have not truly reflected the extent of her contribution. Those of us who are in private practice consider that, except perhaps with large estates, the share given to wives has not hitherto been unduly low. We cannot agree among ourselves whether there is justification for creating a presumption of equal contribution in relation to some assets, and in particular the matrimonial home, subject to its displacement in circumstances that could be indicated in the legislation. This is the rule in Victoria and it is the normal rule in most overseas countries that have any form of community property. However we all regard it as primarily a question of social policy for the Legislature to determine rather than one of law.

FORM OF NEW LEGISLATION

25. As we have already said, we consider further piecemeal amendments to be undesirable and we favour a new Act that would restate the law more clearly and embody the changes we suggest. We recommend that Part VIII of the Matrimonial Proceedings Act should be repealed, although some of its provisions could with advantage be incorporated in the intended Matrimonial Property Act. Thus to the types of order specified in s.5(2) of the present Act might be added an order authorising one spouse to occupy the matrimonial home to the exclusion of the other, and an order for the payment of a lump sum by one party to the other. The provisions for the registration of vesting orders should likewise be carried over, preferably in a simpler form. Sections 80 and 81 of the Matrimonial Proceedings Act will we think need to be incorporated in the new Act although s.79 should remain where it is:

(1) W.M. Mansell, Whither Matrimonial Property, (1971) 4 N.Z.U.L.R. 271.

see L. v. L. [1969] N.Z.L.R. 314. We note that in the recent unreported case of Meadows v. Meadows, Horn S.M. held that sections 80 and 81 were not available in proceedings in the Magistrates' Courts. If this decision is correct then we agree that the law should be altered to allow magistrates to grant the same relief in cases properly before them under the Act as the Supreme Court has. We do not regard these instances as exhaustive but deem it unnecessary to go into all points of detail in this report.

26. A much more important change which we recommend is that any new legislation should avoid the procedural form of s.5(1), which follows very closely s.19(1) of the Married Women's Property Act 1952 and its predecessors. It is surely unsatisfactory to have what has become a considerable body of substantive law in the form of an appendage to a procedural provision. The Family Protection Act 1955 affords a better precedent but there are other possible approaches that the draftsman may wish to consider.

COMMON INTENTION

27. One of the problems that caused us some difficulty is created by s.6(2), which directs the Court not to exercise its general powers under s.5(3) so as to defeat any common intention that it is satisfied was expressed by husband and wife. There are two possible views of the effect of this provision. One is that it is a general provision giving unlimited freedom to the parties to contract out of the Act, but nevertheless subject to s.79 of the Matrimonial Proceedings Act which empowers the Court to vary any settlement between the parties. The objection to this interpretation is that it represents an unreal and artificial approach, because in most cases what is to happen when the marriage breaks down is not in the minds of the parties entering into an agreement that

amounts to a "declaration of common intention". If this is its meaning then we agree that the provision has no place. On the other hand, and we are told that this was in the mind of those who framed the Act, it may have been prompted by the words of Denning M.R. in Hine v. Hine [1962] 3 All E.R. 345: "It is rarely of any use to ask what the parties intended to be done if the marriage broke down for as a rule they do not contemplate any such thing .... Where it can be clearly seen that the parties intended that one piece of property should belong to one or the other in any event that intention should prevail". We can see no objection to the parties being able to enter into an understanding of this sort, and of course it is reasonable that they should be able to make a binding agreement for the division of the matrimonial property after the marriage has broken down. To have to take every case before the Court would be ludicrous. We therefore recommend that s.6(2), clarified along these lines, should be included in any new Act.

THE PROBLEM OF CONDUCT

28. We have not been specifically asked to re-examine the degree to which the conduct of spouses should be relevant in determining their share of the matrimonial property, and we have no particular recommendations to make. Nonetheless we do not think that we should let this question pass entirely without comment, since there is plainly an absence of agreement on the proper approach, the judgments in E. v. E. had much to say about it, and in our opinion it pertains to the fundamental issue of the nature of the spouses' interests under the Act.

29. The Legislature, belatedly following the Victorian precedent, has plainly stated that wrongful conduct not affecting the amount or value of assets is not to be regarded in determining the share of the spouses. This may be thought to have been a reaction to the decision of the Court of Appeal in Pay v. Pay [1968] N.Z.L.R. 140 but we are informed that it was drafted before that case

was known to those concerned. This provision contrasts with the specific relevance given to conduct in the maintenance provisions of the Matrimonial Proceedings Act and more modestly in the Domestic Proceedings Act 1968, a distinction that may be thought to throw light on the approach favoured by Parliament. It suggests that an interest under the Matrimonial Property Act is not to be a reward which may be forfeited for bad behaviour or enlarged as a solace for bad behaviour by the other spouse. Indeed, this was explicitly stated by the Minister of Justice when the bill was before Parliament:

> "The purpose of the Act is not to reward a wife for good behaviour or to punish her for bad behaviour. In questions of maintenance, conduct is very properly made relevant, but under this Act the wife's share is an acknowledgement that she is entitled to something for the contribution that she has made to the family partnership by way of her services. To introduce an element of fault in a substantial way would be to warp altogether the concept behind the Act - the concept of marriage as a partnership." (1)

30. The same point was made in E. v. E. by Wild C.J. who saw the Act as concerned simply with the apportionment of matrimonial property in the event of dispute. Underlying the Act appears to be the supposition that a wife acquires by reason of the marriage itself something in the nature of a property interest in the marriage assets, although necessarily an interest that is not quantified until these assets come to be divided. The quantum is determined, at least in part, by her contribution to the assets as defined in the Matrimonial Property Act. Conduct is expressly declared to be relevant if it affects the acquisition or value of the property in dispute, and this is an important qualification.

(1) 358 N.Z. Parliamentary Debates 3392.

An errant or neglectful spouse will probably not be making a full contribution to the matrimonial home or to the marriage assets generally. Moreover it appears from the words of the section, and was confirmed in E. v. E., that conduct can affect the form of the order.

31. In the light of these considerations we can see no conflict between the provisions of the Act and the dictates of moral sentiment. It is a matter of property, and a wife is no more to be deprived of her property for subsequent bad conduct than a husband is to be deprived of his.

RIGHTS AGAINST THIRD PARTIES

32. In Donnelly v. Official Assignee [1967] N.Z.L.R. 83 the Supreme Court decided that the term "legal personal representative" in the Matrimonial Property Act does not include the Official Assignee and that a question between one spouse and the Official Assignee is not one that can be dealt with under s.5 of that Act. Re D. [1967] N.Z.L.R. 828 suggested that any contractual licence to occupy the matrimonial home would not be binding on the Official Assignee. We do not think it could be seriously argued that either of these decisions is incorrect. The only general statutory provision bearing on the subject is s.43 of the Insolvency Act 1967, which repeats with minor changes s.15 of the Married Women's Property Act 1952. To the extent that s.43 evidences a policy, it is to accept one spouse as a creditor of the other for property lent or money advanced, but postponed insofar as recent advances are concerned to other creditors.

33. The Law Society has proposed that the Act be amended to enable a spouse to pursue his or her rights in the matrimonial property against the Official Assignee. We think that there is a great deal to be said in favour of this. Analogies are unprofitable but some of us feel that the interest of the spouse who is not by virtue of the traditional rules the owner is akin to a beneficial interest under a trust, and this clearly suggests that the interest should not pass to third parties (such as the Official

Assignee) who acquire the interest otherwise than for value. On the other hand the partnership analogy might be suggested - that the matrimonial property should be regarded as the common property of husband and wife, used so to speak in the conduct of their married life, their interests being separated and crystallised out only on the occurrence of a particular event - death, the prior breakdown of the marriage, or a specific order of the Court. That is the more usual conceptual basis of matrimonial property law overseas, and on that analogy the matrimonial property might be treated as available to the creditors of both spouses.

34. Irrespective of the way in which the interest arising under the Act is to be categorised, we can see objections to pressing either approach to an extreme, and we prefer to steer a middle course. We hold the view that the interest of a spouse which exists by virtue of the Act is a present unquantified property interest that should not ordinarily pass upon the bankruptcy of the other spouse, or be available to his creditors. Conversely, and we regard this as an essential corollary, this interest should be available to the creditors of the spouse to which it belongs, notwithstanding that it stands in the name of the other spouse. There should, however, be power to make the interest of one spouse subject to the claims of creditors of the other spouse in appropriate circumstances. The sort of case we have in mind is where husband and wife are engaged in a joint enterprise with awareness of debts being incurred, or where the debts are incurred in the course of managing the affairs of the household in the common interest.

35. We accordingly recommend that provision should be made whereby upon the bankruptcy of one spouse an application under the matrimonial property legislation may be made, either by the other spouse or by the Official Assignee, to determine the respective interests of the spouses. The creditor's claims would be against the assets only of the

insolvent spouse, subject to the power of the Court to order that such part of the assets of the other as it thinks appropriate should be available to the creditors or to some of them.

36. In coming to this view we have paid very careful attention to the arguments against it, which are basically that it is unfair to creditors and could have the undesirable effect of impairing the ability of married people to obtain credit.(1) Dealing with the second objection first, we think that in practice this would not happen. Most unsecured creditors take a person as they see him, without so to speak inspecting a balance sheet of his assets and liabilities, and a debtor's income and general standing and reputation are much more important than the precise value of his capital assets. No doubt the ownership of property is given substantial weight in assessing standing and reputation since it provides an indication of the debtor's position and stability, but the changes we propose would not affect this.

37. To some degree the issue whether our recommendations are unduly generous to spouses at the expense of creditors depends on the more fundamental question of the nature of rights in the matrimonial property. To allow the principles of matrimonial property law to be determined by their legal effect on the rights of future creditors would, we suggest, be the tail wagging the dog. If as we believe it is just that a wife should have a proprietary interest in the marriage assets, the position of creditors should fall to be adjusted accordingly, just as the revolutionary change made by the Married Women's Property Act was carried through notwithstanding its effect on future creditors of the husband. We repeat what we see as the foundation of the legislation we recommend - that a wife (and a husband) should acquire by virtue of the marriage

(1) We acknowledge here the valuable comments we have received on this matter from the Official Assignee at Wellington, Mr E.A. Gould.

itself a present unquantified property interest in the marriage assets. However this is to be classified conceptually, it is certainly much more than a mere claim in debt against the property of the other. To return to the trust analogy, our proposal in this regard is no more than a reaffirmation of the principle that a trustee's debts do not constitute a charge over, nor are they to be met out of, the estate assets.

38. In any event, however, we see no reason to suppose that if our recommendations are accepted the position of creditors will really be impaired in any way. A creditor who is sufficiently prudent to evaluate a prospective debtor's nominal estate may also be expected to know the law, and to know that the debtor is not solely entitled to any asset that constitutes matrimonial property within the meaning of the Act. He would be fairly safe in assuming that the quantity of this interest will not be more than half and could be much less. At his option he may take this into account in deciding what credit he will give, or he may elect to contract with both husband and wife. The second course would be no more than an extension of the common practice of requiring a husband to guarantee his wife's debts or insisting that a married woman should contract as the agent of her husband.

39. Would this allow married people to have their cake and eat it? We do not think that this is a just or a germane criticism. In any successful marriage both spouses share the assets of each and derive advantage from them, just as they share the voluntary services performed by each. It does not follow that if one spouse becomes insolvent both ought to lose their property. The present law does not require this and we have heard of no suggestion that it should. What we are proposing can for this purpose be regarded as no more than re-defining what is his and what is hers in the light of principles that are broader and more faithful to reality than the present law.

SAFEGUARDS FOR INTEREST

40. A provision of the nature we have recommended would give a very full degree of protection for the interests of one spouse against the creditors of the other. There remains, however, the case of bona fide purchasers and secured creditors. Should one spouse, in whose name the property happens to stand, have an unfettered right to deal with and dispose of it to the possible detriment of the other? One answer is that there are already safeguards in sections 80 and 81 of the Matrimonial Proceedings Act 1963, which are applied to the Matrimonial Property Act by s.7(5). Section 80 empowers the Court to restrain intended dispositions made with the object of defeating rights under the Act, and s.81 lays down a procedure, analogous to tracing, for the recovery of property already disposed of, or its proceeds, from anyone who has acquired it otherwise than in good faith and for adequate (not merely valuable) consideration. We have already recommended that similar provisions be incorporated in the Matrimonial Property Act, with such desirable changes of detail as the inclusion of provision for giving notice of orders made thereunder.

41. This, however, is not sufficient of itself. What is wanted in our opinion is some simple and reasonably effective way of preventing dealings which either in intent or effect may defeat the interests of a spouse who is not the nominal owner. We considered the idea of protecting at least the matrimonial home by requiring both spouses to join in any instrument disposing of or charging it unless the parties are living apart under a formal separation, or the Court grants leave. Such a provision, which exists in the law of several overseas jurisdictions such as California and Sweden, has its attractions. It would represent a formal recognition of the present interest of the wife as well as the husband in the matrimonial home and we do not think that a carefully framed provision would necessarily be impractical. It would however be most unlikely, without sacrificing some fundamental advantages of the land transfer system, to

prevent a determined attempt at fraud.

42. On balance, however, we accept that it is not necessary to go as far as this and we favour introducing the already familiar notion of a caveat. A spouse who is not registered on the title as a proprietor should be able, whether or not proceedings under the Act have been commenced or are in contemplation, to register notice of an interest against any land, or indeed against any property the title to which is the subject of registration, for example company shares. This notice should remain in effect until the Court orders its removal, either in general proceedings under the Act or on a special application for the purpose, or unless an instrument disposing of the property and signed by both parties is presented for registration.

43. The suggestion has been made that such a procedure might be limited to the matrimonial home, but we can see no sufficient justification for such a restriction. It is, moreover, subject to the practical difficulty that it will not be apparent from the title, and may not be easy to determine on the facts, whether a particular piece of land is or is not "the matrimonial home".

EVIDENCE

44. The suggestion has been made by a Wellington practitioner that there is need for a provision in the Matrimonial Property Act similar to sections 11 and 11A of the Family Protection Act, which allow the Court to receive otherwise inadmissible evidence relating to the reasons of a deceased person for the testamentary dispositions he has made, and creating a duty on the administrator to disclose such information as he has in his possession relating to those reasons. This is relevant because the Matrimonial Property Act applies to claims by or against the personal representatives of a deceased spouse. There may be cogent hearsay material related to such questions as the performance of services

and prudent management, conduct related to the extent and value of the property, common intention and so on.

45. In our view there is a good case for empowering the Court to receive in proper cases under the Matrimonial Property Act evidence that is normally inadmissible. Bearing in mind that the Matrimonial Property Act pertains rather to family law than to traditional property law, however, we would prefer a more general provision simply allowing the Court in any proceedings to receive any evidence that it thinks fit, whether otherwise admissible in a Court of law or not. There are precedents for this in the Domestic Proceedings Act and the Guardianship Act, and we think this sort of provision should overcome the difficulties raised. We so recommend.

JURISDICTION

46. In a comprehensive enactment on the subject of matrimonial property there may be value in laying down what might be termed conflict of laws or jurisdictional rules, in the interests of convenience of reference, of avoiding the possibility of their being overlooked, and of removing certain obscurities and inconsistencies in the cases. This has been done with advantage in the Matrimonial Proceedings Act, the Guardianship Act and the Domestic Proceedings Act. We are indebted to Professor P.R.H. Webb of the University of Auckland for drawing attention to this and for his comments on the case law. What we have in mind is not a codification and revision of the rules of private international law on the subject, but the more modest aim of defining the applicability of the New Zealand legislation. There are grounds for thinking that the present rules are in certain details unrealistic and anomalous. However, we content ourselves with recommending that the application of the Act should be made clear, and with suggesting that in preparing any new legislation the Department of Justice should consult with Professor Webb and others with this object.

SUMMARY OF RECOMMENDATIONS

47. We recommend:

(1) the enactment of a single statutory code governing matrimonial property in New Zealand: (para. 3). Such a code should be based on the Matrimonial Property Act 1963 but should have incorporated into it most of the provisions of Part VIII of the Matrimonial Proceedings Act 1963, as well as the new provisions we are now proposing;

(2) that the new statute should extend to all the assets of the marriage, by which we mean all property acquired in contemplation of the marriage by either party, all property acquired since the marriage by either party (otherwise than by gift or inheritance from third parties), and any accretion during the marriage in the value of previously owned property: (para. 22);

(3) that the concept of contributions should be related to the marriage assets in general, so that "a global order" (of the sort refused by the Court of Appeal in E. v. E., supra) can be made in appropriate cases: (para. 23). However, we recognise that special attention should still be paid to the matrimonial home;

(4) that the Court should be obliged to have regard to contributions made to the property in dispute in all cases: (para. 24). At present the Court is only so obliged where the dispute concerns the matrimonial home;

(5) that to the types of order which a Court may make, at present specified in s.5(2) of the Matrimonial Property Act 1963, should be added an order authorising one spouse to occupy the matrimonial home to the exclusion of the other, and an order for the payment of a lump sum by one party to the other: (para. 25);

(6) that a substantive approach, possibly along the lines of the Family Protection Act should be substituted for the procedural approach of the present legislation (s.5(1) of the Matrimonial Property Act): (para. 26);

(7) that s.6(2) of the present Act should be clarified to the effect that an expressed common intention shall only be binding on the parties where the event that has happened (e.g. divorce, death of one spouse, etc.) was clearly in the parties' contemplation when that intention was formulated: (para. 27);

(8) that on the bankruptcy of one spouse his or her assets only (defined in terms of matrimonial property law) should be available to the creditors, but subject to the power of the Court to order that such part of the assets of the other spouse as the Court thinks fit shall also be made available: (para. 35). The rule in Re Donnelly (supra) should be abrogated to allow an application by one spouse to be brought against the other's assignee in bankruptcy;

(9) that where legal title to property depends on registration the spouse who is not on the register should have a right to note

his or her interest on the title to the property: (para. 42). We envisage that something along the lines of the present caveat procedures under the Land Transfer Act could be adopted;

(10) that the Court should have power to hear any evidence it thinks fit, whether or not the same is legally admissible under the ordinary rules of evidence: (para. 45);

(11) that in any new code the jurisdiction of the Court in the conflict of laws sense should be specified: (para. 46).

For the Committee

B J Cameron

(B.J. Cameron)
Convenor