

## TRUSTS, THE MATRIMONIAL HOME AND *DE FACTO* SPOUSES

by

JOHN WADE\*

In the case of *Allen v. Snyder*<sup>1</sup> the N.S.W. Court of Appeal, consisting of Glass, Samuels and Mahoney JJ.A., considered again the vexed question of when does a spouse, either *de jure* or *de facto*, have an equitable proprietary interest in the matrimonial home? Whole forests have been destroyed in the discussion of this question since the Second World War<sup>2</sup> and especially since the widespread introduction of photocopying machines. Students are usually confronted with this question in at least three traditional subjects taught at Law School:— Real Property, Equity and Family Law.

The writer suggests that the judgment of Mahoney J.A. is of particular interest in the ongoing debate. It represents a movement towards the reforming end of the stability-flexibility common law pendulum.

The principles discussed in *Allen v. Snyder* remain important to a practitioner who is giving advice concerning the ownership of property in at least the following four situations:

- (i) Where the marriage of a *de jure* husband and wife has broken down, and proceedings for principal relief under the *Family Law Act* 1975 (Com.) cannot or will not be commenced, yet the spouse who is not the legal owner of the home wants to claim an equitable proprietary interest by means of caveat, partition, equitable injunction or proceedings under s. 22 of the *Married Person's (Property and Torts) Act* 1901-1978 (N.S.W.).<sup>2a</sup> Between *de jure* spouses this situation will, for the moment, be relatively rare as most broken marriages do contemplate future divorce proceedings and thereby enable temporary injunctive relief under the *Family Law Act*.<sup>2b</sup>

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\* LL.B., Dip. Jur. (*Syd.*), LL.M., (*Br. Col.*), Lecturer in Law, University of Sydney.

1 [1977] 2 N.S.W.L.R. 685; Comment, W. M. Gummow, (1978) 94 *L.Q.R.* 351; Mr. Justice M. M. Helsham, (1979) 8 *Sydney L.R.* 571, at p. 575-7.

2 E.g. amidst the vast literature, important cases include *Gissing v. Gissing* [1971] A.C. 886; *Pettitt v. Pettitt* [1970] A.C. 777; *Wirth v. Wirth* (1956) 98 C.L.R. 228; *Hepworth v. Hepworth* (1963) 110 C.L.R. 309; *Murdoch v. Murdoch* (1974) 41 D.L.R. (3d) 367. Amidst the many commentaries see S. Cretney, *Principles of Family Law* (1976) at pp. 253-274; Mendes da Costa, *Studies in Canadian Family Law* (1972) Ch. 5 by M. C. Cullity; Snell's *Principles of Equity* Ed. by Megarry and Baker, (1973) at pp. 172-188.

2a For equivalent sections in other states see *Married Women's Property Act*, 1890-1952 (Qld.) s. 21; 1892-1962 (W.A.) s. 17; *Law of Property Act*, 1936-1975 (S.A.) s. 105; 1935 (Tas.) s. 8; *Marriage Act*, 1958 Pt. VIII (Vic.).

2b 1975 (Com.), s. 114 (1), (3). In the marriage of Tansell (1977) F.L.C. 90-307; J. Wade (1978) 16 *Law Soc. Journ. (N.S.W.)* 233.

- (ii) Where there is a property dispute between unmarried persons such as a couple in a *de facto* marriage relationship.<sup>3</sup> *De facto* marriage seems now to be reasonably common amongst the middle (and thus propertied) classes. 'There is an increasing tendency, I have found in cases in chambers, to regard and, indeed, to speak of the celebration of marriage as "the paper work"'. The phrase is: "We are living together but we never got around to the paper work".'<sup>4</sup>
- (iii) Where there are questions of ownership of a house (or other property) upon the death of a *de facto* or *de jure* spouse.<sup>5</sup> These questions may arise in relation to the interpretation of a will, intestacy, testator's family maintenance or death duties.
- (iv) Where one spouse is declared bankrupt and his/her partner claims an interest in the bankrupt's property.<sup>6</sup>

Briefly, the facts of *Allen v. Snyder*<sup>7</sup> were as follows: An unmarried man and a married woman having met in 1955, lived together in broken periods for a total of some thirteen years. At first they intended to marry when the woman was free to do so. Nevertheless, when in 1969, the woman became free, they did not marry. During the years of 1966 to 1974, they lived together in a house of which the man was the legal owner. Between 1974 and 1977 the woman lived in the house alone.

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- 3 E.g. *Richard v. Dove* [1974] 1 All E.R. 888; *Eves v. Eves* [1975] 3 All E.R. 768; *Cooke v. Head* [1972] 1 W.L.R. 518; *Tanner v. Tanner* [1975] 1 W.L.R. 1346; *Horrocks v. Forray* [1976] 1 W.L.R. 230; *McRae v. Wholley*, S.C. of W.A. 15th August 1915, Jones J.; *Frazer v. Gough* (1975) 1 N.Z.L.R. 138; *Valent v. Salamon*, No. 1 and No. 2, Supreme Court of N.S.W., 8th Dec., 1976, (No. 1), 16th March 1977 (No. 2), (Holland J.); *Pearce v. Pearce* [1977] 1 N.S.W.L.R. 170, 173 (Helsham C.J.); R. J. Bailey, 'Legal Recognition of De Facto Relationships,' (1978) 52 *A.L.J.* 174; A. Bissett-Johnson; 'A Mistress's Right to a Share in the Matrimonial Home,' (1975) 125 *New L.J.* 614; C. S. Bruch, 'Property Rights of De Facto Spouses,' (1976) 10 *Fam. L.Q.* 101; M. A. Neave, 'The Constructive Trust as a Remedial Device,' (1978) 11 *Melb. U.L.R.* 343.
  - 4 *Campbell v. Campbell* [1976] 3 W.L.R. 572, 577. It is impossible to statistically prove the alleged increased incidence of *de facto* marriages. E.g. S. Poulter, 'The Death of a Lover No. 1' (1976) *New L.J.* 417; C. S. Bruch, 'Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services,' (1976-77) 10 *Fam. L.Q.* 101 fn 1; Tasmanian L.R.C., *Report on Obligations Arising from De Facto Relationships* (No. 36) 1977 at p. 3; Royal Commission on Human Relations, *Final Report*, Aust. G.P.S. 1977, Vol. 4 at pp. 72-73. They have been historically common among poor people e.g. G. O. W. Mueller, 'Inquiry into the State of a Divorceless Society: Domestic Relations Law and Morals in England from 1660-1857', (1957) 18 *U. of Pittsburg L.R.* 545; M. Rheinstein, *Marriage Stability, Divorce and the Law*, (1972) esp. at pp. 158-193.
  - 5 E.g. *Re Cummins* [1972] Ch. 62; *Re Nicholson Deceased* (1974) 118 S.J. 133; *Kemp v. Pearce* (1972) 21 F.L.R. 315; [1972] V.R. 805; K. Lindgren, 'Death Duty and the Matrimonial Home in Australia' (1974) 8 *U. of Queensland L.J.* 108; *Horton v. Public Trustee* [1977] 1 N.S.W.L.R. 182 (*de facto* wife entitled to one-half interest in home held by deceased husband's administrator); *Olsen v. Olsen* [1977] 1 N.S.W.L.R. 189 (*de facto* wife entitled to whole beneficial interest in home held by deceased husband's executors); *Horrocks v. Forray* [1976] 1 W.L.R. 230 (mistress not entitled to contractual license over deceased's house).
  - 6 E.g. *Re Solomon* [1967] Ch. 573; *Re Turner* [1974] 1 W.L.R. 556; cf. *Re Densham* [1975] 1 W.L.R. 1519.
  - 7 Summarised from the headnote.

By proceedings commenced in 1974 the man sought to evict the woman from the house. In 1977 an order for possession was made in his favour.

The woman appealed to the N.S.W. Court of Appeal and argued that she had a beneficial interest in the house.

It was submitted for the woman (1) that the trial judge should have inferred, as a matter of fact, that the parties had a common intention, at the time of the purchase, that the beneficial interest in the property was to be divided equally between them; and, alternatively, (2) that the trial judge should have imputed that intention to the parties, at that time, as a matter of law. The facts relied upon by the woman were as follows: (1) whilst the parties were living in rented premises, the woman suggested that the man should finance the purchase of a home through the War Services Homes Department; (2) to this end, she made a statutory declaration that she was living with, and financially dependent upon, the man; (3) without such declaration no loan would have been granted; (4) however, the relevant Act did not permit the title to be placed in the name (alone or jointly) of a *de facto* wife; (5) after the loan had been granted and the house purchased, the woman furnished it out of her own funds; (6) the man made a will in the woman's favour, prior to the purchase of the house, with the admitted object of ensuring her title to it, should he die before they were married.

The Court of Appeal unanimously confirmed that she had no equitable proprietary interest in the house and dismissed the appeal. All three judges decided that firstly, there was insufficient evidence of an actually expressed intention, (called a 'subjective' intention by Glass J.A.) common to both the man and woman, that the woman would receive a beneficial interest; secondly, that there were no appropriate facts, such as unconscionable conduct by the legal owner, to justify the imposition of a trust for the benefit of the woman.

All three judges followed their respective perceptions of what the majority had decided in the House of Lords in *Gissing v. Gissing*<sup>8</sup> and *Pettitt v. Pettitt*.<sup>9</sup> However, it is important to remember that there is an ongoing stream of judicial and scholarly debate attempting to ascertain what was said by the House of Lords in those cases. All agree that the heresy of unfettered judicial discretion<sup>10</sup> was put to rest; but no one is clear concerning what principles, except at a very generalised level, have replaced it.

The following five comments are offered in relation to the judgments of the Court of Appeal in *Allen v. Snyder*. As the facts and transcript of the original trial are reproduced only briefly in the report, some of these comments may need qualification in the light of the complete facts.

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8 [1971] A.C. 886.

9 [1970] A.C. 777.

10 Once alleged to be contained in s. 17 of the *Married Women's Property Act, 1882* (U.K.); s. 22 of the *Married Person's (Property and Torts) Act 1901-1964* (N.S.W.); e.g. *Rimmer v. Rimmer* [1953] 1 Q.B. 63; [1952] 2 All E.R. 863. *Ante* text at n. 2a.

### 1. *What's in a Name*

All three judges helpfully acknowledge the difficulties of fitting certain fact situations, where a trust has been held or argued to exist,<sup>11</sup> into traditional systematised categories of trust.<sup>12</sup> Mahoney J.A. especially notes that confusion may possibly follow where judges and academics try to squeeze the practice of the courts into pre-supposed categories of knowledge.<sup>13</sup>

Thus, there is such a thing as a trust arising from an express oral common intention or agreement which is enforceable in the shares agreed upon,<sup>14</sup> despite the absence of written evidence which is normally required to make an express trust enforceable.<sup>15</sup> However, such an express oral arrangement is enforceable only where it would be unconscionable for the legal owner to deny the claimant (who shared the common intention) an interest.<sup>16</sup> Thus, this kind of trust has two elements — actually expressed common intention and unconscionability.

To begin with, it is not clear that the phrase 'common intention' is a particularly apt one. It seems that the situation where the legal owner expressly or impliedly communicates his/her intention to the claimant/contributor could be more accurately described as the actually communicated intention of the legal owner. Nevertheless, despite its contractual overtones, 'common intention' seems to be the presently accepted judicial phrase. Furthermore, the adjective 'subjective' used in *Allen v. Snyder* to describe common intention may cause some confusion. No doubt 'subjective' is used to delineate an intention proved by evidence, as compared to factually non-existent intention imputed by legal fiction. However, the adjective 'subjective' has a more traditional meaning and thereby may cause confusion in those cases where the legal owner outwardly says one thing (e.g. 'You will have a share in the house') but inwardly says another (e.g. 'I am going to keep this house for myself'). In such fact situations, the courts will clearly take notice of the legal owner's objective or outward or expressed intention, as compared to his inward, usually called *subjective*, intention. In that traditional sense, *Allen v. Snyder* is really emphasising the objective, rather than the subjective, common intention.

In order to avoid this problem, it is submitted with respect that the words 'objective' and 'subjective' should be avoided. Alternatively the phrase 'actually expressed' or 'outwardly expressed', though clumsy, may be more accurate.

Beyond terminology to more terminology — what label should be given to this kind of trust dependent on the elements of actually expressed common intention and unconscionable conduct? Constructive?

11 E.g. *Pettitt v. Pettitt* [1970] A.C. 777 *Gissing v. Gissing* [1971] A.C. 886.

12 At pp. 691D-693A; 698C-669F; 703B-703D.

13 At pp. 703B-703D.

14 At p. 692D.

15 S. 23C of the *Conveyancing Act 1919* (N.S.W.).

16 At pp. 694C-D; 699G; following Lord Diplock in *Gissing v. Gissing* [1971] A.C. 886 at 905.

Implied? Imputed? Presumed? Inferred? Express? Resulting? Or a new name altogether

It is not a classic 'constructive' trust as it is dependent on some expression of intention, by both the legal owner and beneficiary, that the beneficiary receive an interest. In contrast, the classic constructive trust usually arises as a matter of law, regardless of the parties' intentions, in order to prevent the legal owner benefiting from his unconscionable conduct.

Nor is it easily within the boundaries of a resulting trust, which classically has confirmed an interest on the beneficiary in proportion to the beneficiaries' contribution towards the acquisition of the legal title of the property based on the rebuttable presumption that such was the parties' intention.

Nor is it 'simply' or 'merely' an express trust because an express trust is not enforceable unless evidenced in writing.<sup>17</sup>

However, both Glass and Samuels J.J.A. indicate that it may well fit into that category of express oral trusts which are enforceable because the legal owner's conduct has been sufficiently unconscionable for it to be improper for him/her to use s. 23C (1) of the *Conveyancing Act* as a defence.<sup>18</sup> Obviously, the weasel word here is 'unconscionable' and the uncertainty remains concerning what degree of 'unconscionability' is necessary. Words may be changed to 'breach of faith', 'inequitable' or 'equitable fraud' but the problem of which facts fit the category still remains.

Glass J.A. prefers to classify the unsuccessfully alleged trust in *Allen v. Snyder* as a *Rochejoucauld v. Boustead* situation,<sup>19</sup> but is willing to acknowledge the acceptable, if somewhat strained use of other labels, such as constructive or implied trust.<sup>20</sup>

Given some freedom with categories, the question still clearly remains what fact situations will probably prompt a court to find the twin elements of actually expressed common intention and unconscionable conduct?

## 2. Searching for the Actual Common Intention

By emphasising so clearly the need for a factual common intention, Glass and Samuels J.J.A. have raised at least the following potential issues:

- (i) There is a danger that if the courts take the search for 'real' or subjective or outwardly expressed common intention too seriously, this will lead to an evidentiary farce. It is asking for evidence of an intention that was not even considered, or if thought of, was too delicate a subject to raise at that stage of the romance or mar-

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17 S. 23C (1) of the *Conveyancing Act* 1919 (N.S.W.).

18 At pp. 692E-F; 699C-E; e.g. *Rochejoucauld v. Boustead* [1897] 1 Ch. 196; *Re Densham* [1975] 1 W.L.R. 1519; [1975] 3 All E.R. 726.

19 At p. 692E; also perhaps Samuels J.A. at 699D-E.

20 At p. 693A-B; cf. F. Webb, 'Trusts of Matrimonial Property', (1976) 92 *L.Q.R.* 489.

riage.<sup>21</sup> It is clear that passionate couples will not be negotiating at arms length. Yet, no doubt later when the relationship disintegrates, each party will have no trouble remembering (with some legal prompting or, perhaps, coaching) and presenting self-serving evidence of their real state of mind.<sup>22</sup>

- (ii) Presuming that a court is able and willing to find a factual common intention that the claimant is to receive an interest, what else if anything is necessary to create a trust? The answer seems to be that unconscionable conduct or conduct amounting to an equitable fraud is a necessary additional element.<sup>23</sup> However, what conduct is sufficiently unconscionable?

There can obviously be escalating degrees of unconscionability. For example:

- (a) Breach of the common intention alone before any action in reliance or contribution by the claimant has occurred?<sup>24</sup> If so, how is this any different to breach of an express trust which is unenforceable under s. 23C (1) of the *Conveyancing Act*?<sup>25</sup>
- (b) A premeditated plan by the legal owner *prior* to the formation of the factual common intention to later revoke that intention. Subsequently the planned revocation is effected though before any action in reliance or contribution by the claimant.
- (c) Breach of the common intention by the legal owner after some action to his/her detriment by the claimant, such action being reasonably foreseeable.<sup>26</sup>
- (d) Breach of the common intention by the legal owner after action to his/her detriment by the claimant such action being specified by the common intention.
- (e) Breach of the common intention by the legal owner after making some contributions, however small, to facilitate acquisition of the legal title, such contribution being specified by the common intention.<sup>27</sup> Would equity ever award a half interest in a house for a contribution of a kitchen chair?
- (f) Breach of the common intention by the legal owner after making some *substantial* contribution, to facilitate acquisition of the legal title, such contribution being specified the common intention.<sup>28</sup>

21 At pp. 705E-706A.

22 *E.g.* at p. 696B.

23 *E.g.* at pp. 692D-E; 699E-G.

24 This seems to be suggested at p. 694E. Supported by the judgments, but not the facts in both *Lincoln v. Wright* (1859) 4 De G. & J. 16 and *Roche-Joucauld v. Boustead* 1897 1 Ch. 196 where the claimants did act in reliance on the legal owner's expressed intention. See F. Webb, (1976) 92 *L.Q.R.* 489, 493.

25 At p. 691A.

26 Perhaps Lord Diplock's view in *Gissing v. Gissing* [1971] A.C. 886, 905.

27 Suggested at p. 690E as sufficient.

28 Ordinary duties as housewife have only been considered insufficient contribution in England where there has been little or no evidence of actual common intention *e.g.* *Button v. Button* [1968] 1 All E.R. 1064; *Cooke v. Head* [1972] 1 W.L.R. 518; *Eves v. Eves* [1975] 3 All E.R. 769; *Tulley v. Tulley* (1965) 109 Sol. J. 956.

At least in this last category there is no doubt on any authority that actual common intention plus a substantial contribution will mean that it is unconscionable for the legal owner to deny the contributor's specified interest.

Nevertheless, despite a core certainty, not only is there difficulty in knowing which facts will lead to the discovery of a common intention, but also which facts will prompt the label unconscionability, breach of faith, inequity or equitable fraud.

- (iii) In those cases where the actual common intention is clearly established by evidence, why is the law of unilateral or bilateral contract<sup>29</sup> or the principles of proprietary estoppel<sup>30</sup> not applicable once the promisee wife contributes in reliance upon the express or implied promise of the legal owner? Under the law of contract, the size of the wife's contribution can be as small as a peppercorn but her interest is fixed by the terms of the contract; under proprietary estoppel the flexible equitable remedy can consist inter alia of a charge over the house equivalent to the value of the contribution.<sup>31</sup> The overlap of the law of trusts with these two other areas is rarely explored in the cases.<sup>32</sup>
- (iv) Glass and Samuels J.J.A. agree that there was no doubt that the female defendant had proved an actual common intention that she should have a beneficial half interest but only upon marriage.<sup>33</sup> The difficulty then being, that the marriage did not occur.

This raises at least two apparently unexplored problems. First, what were the precise terms of this proven common intention? Could the facts again slide through the marshy boundaries of equity, this time into the area of bilateral contract? Was there expressly or impliedly a promise by the female to marry<sup>34</sup> in exchange for a promise by the male

29 *E.g. Popiw v. Popiw* [1959] V.R. 197 (husband promised estranged wife an interest in home if she returned to him; she did so and contract established); *Ogilvie v. Ryan* [1976] 2 N.S.W.L.R. 505 (Holland J.) (Female lived with widower for ten years on condition that he provide her with a house for life. Female able to enforce this undertaking against widower's estate as a constructive trust. There was also a contract, but held unenforceable due to *Statute of Frauds*); Comment, Neave, *supra* n. 3 at 361-368; *Tanner v. Tanner* [1975] 1 W.L.R. 134 (C.A.) (married man acquired house for his mistress and the two children she had borne to him. Held that she had a contractual right to reside there until children had completed their education); *Pearce v. Pearce* [1977] 1 N.S.W.L.R. 170 (Helsham C.J.) (a *de facto* wife of 20 years, who had given birth to four children, made substantial contributions to the cost of purchase of the house, and who had been falsely told that the home was in both names, held to have a contractual license to occupy).

30 *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129; *Dillwyn v. Llewellyn* (1862) 4 De G.F. & J. 517; *Inwards v. Baker* [1965] 1 Q.B. 29.

31 *Ibid.*

32 *E.g.* See *Raffaele v. Raffaele* [1962] W.A.R. 29 (son held to have an interest in his parents' land under either law of contract or proprietary estoppel); Note by D. E. Allan in (1963) 79 *L.Q.R.* 238. See now J. D. Davies, 'Informal Arrangements Affecting Land' (1979) 8 *Sydney L.R.* 578.

33 At p. 696E.

34 If so, there would have been problems with traditional public policy as at least initially when she might have made the promise, she was already married. *E.g. Fender v. St. John Mildmay* [1938] A.C.1; [1937] 3 All E.R. 402; *Psaltis v. Schultz* (1948) 76 C.L.R. 547.

to give an interest in his home, coupled with his promise to marry? The willing-to-wed female could then arguably bring an action for breach of contract which would not come within the prohibition of heart balm actions in s. 111A of the *Marriage Act* 1961-1976 (Com), due to the presence of property consideration.

Secondly, if the actual common intention was so clear, does that give rise itself to an existing trust which is contingent on a series of contributions, the last one of which, namely marriage, was thwarted due to the trustee's fault? There may be problems recognizing a trust where part of the common intention was extra-marital cohabitation.<sup>35</sup> Should equity allow a trustee to benefit from an express arrangement where the trustee himself wilfully ensures that its terms are not fulfilled?

It may well be that on the particular unreported facts of *Allen v. Snyder*, such arguments were not appropriate.

### 3. *Fairness*

All three judges agree that a trust will not be imposed by the court merely because it is fair to do so, or unfair not to do so.<sup>36</sup> This is a standard oft-repeated proposition since at least *Wirth v. Wirth* in Australia;<sup>37</sup> *Pettitt v. Pettitt* in England<sup>38</sup> and *Rooney v. Rooney*<sup>39</sup> in Canada, in order to quench the reforming efforts of the English Court of Appeal, and especially of Lord Denning.

Its balancing proposition is that the Court, whether acting procedurally under s. 22 of the *Married Person's (Property and Torts) Act* 1901 (N.S.W.) or otherwise, only has power to declare and enforce the 'proprietary rights' of the parties. The implication is that the ascertainment of proprietary rights involves no exercise of discretion or evaluation of fairness. But these statements concerning the absence of 'judicial discretion' must be read in the context of attempting to suppress a heresy. It is submitted that the ascertainment of equitable proprietary interests for at least thirty years has involved *some degree* of judicial discretion and evaluation of 'fairness'. It is a matter of narrowing the boundaries of the judicial discretion to something less than an unfettered discretion and distinguishing degrees of fairness.

It has already been mentioned that Glass and Samuels JJ.A. perhaps legally recognize one situation of unfairness (relatively infrequent in practice) — namely where the legal owner by pre-meditation or after-thought revokes an intention to bestow an interest on the claimant which intention she/he once outwardly shared with the claimant.<sup>40</sup> And they certainly legally recognize this element of unfairness when coupled with

35 *E.g. Zapletal v. Wright* [1957] Tas. S.R. 211; cf. *Carkeek v. Tate-Jones* [1971] V.R. 691; *Andrews v. Parker* [1973] Qd. R. 93 (court willing to enforce property arrangement between *de factos* even though immoral consideration possibly involved); *Marvin v. Marvin* (1976) Sup. 134 Cal. Rept. 815.

36 At p. 690D; 704-705.

37 (1956) 98 C.L.R. 228.

38 [1970] A.C. 777.

39 (1969) 68 W.W.R. 641; also *Murdoch v. Murdoch* (1974) 41 D.L.R. (3d) 367.

40 At pp. 694E; 699.



the fact of the claimant acting somehow to his/her detriment while relying on the common intention.<sup>41</sup> It is submitted that there is clearly some degree of discretion in judging what degree of detriment must be suffered by the claimant before the onlooking owner is guilty of unconscionable conduct.

Nevertheless, 'unfairness' remains a relatively narrow principle if always pre-conditioned by the need for revocation of a strictly-proven factual common intention.

In contrast, Mahoney J.A. appears to go further and recognises the possibility of a wider range of legally relevant unfairness.<sup>42</sup> He rejects unfairness as a test for the creation of an equitable proprietary interest, but accepts the possibility of gross unfairness being such a test.<sup>43</sup> To deny an equitable interest may be 'so contrary to justice' or create such a 'sense of injustice'<sup>44</sup> that the court ought to be willing to impose a trust. What is substantial injustice will vary 'in different places and at different times'<sup>45</sup> and will not necessarily be the same in English and Australian societies.<sup>46</sup>

Vague as the boundary between 'mere unfairness' and 'substantial unfairness' may be, and difficult as the judicial role as amateur sociologist and predictor of public opinion may be, it is submitted that Mahoney J.A.'s comments may be more helpful in reflecting what the Commonwealth courts have been doing, and what they are likely to do in the future, than the much debated formulae of the various members of the House of Lords in *Gissing v. Gissing*.

In *Allen v. Snyder*, it may seem unfair that the defendant female received no financial reward for giving many years of her life to a man who left her. But was it grossly unfair when the only material contribution she evidently made was the *use* of some furniture which remained her own property? In both *Gissing* and *Pettitt* the claimants spent £220 and £1000 respectively for the absolute benefit of the legal owner, and received no equitable interest. Here, the extent of her contribution standing alone, arguably does not even bring the case into the borderland of gross injustice.

Finally, it is clear even on the view set out by Glass and Samuels J.J.A. that there is a *degree* of judicial discretion present whenever a judge decides what kind of conduct of the parties is sufficient to allow the inference of a factual common intention to benefit the contributor. Judicial discretion is then even further present when inferring from conduct the size of the agreed-upon interest.

Thus, it is submitted that the degree of contribution, pre or post acquisition, direct or indirect, by the claimant is very relevant to the degree of injustice perceived if the claimant is denied an interest. There-

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41 See *infra* text at nn. 23-28 for discussion of meanings of 'unconscionable'.

42 At pp. 706-707.

43 *Ibid.*

44 At p. 706F.

45 *Ibid.*

46 At p. 707C.

by the degree of injustice perceived is one important indicator, and may be the most useful indicator in many common fact situations, of when the courts will find an equitable interest.<sup>47</sup>

#### 4. *Judicial Words and Judicial Practice*

To repeat, Glass and Samuels J.J.A. emphasise that the critical fact necessary to trigger the existence of this kind of trust, is the presence of a 'subjective' or factual common intention that the legal owner will not hold the full beneficial title.<sup>48</sup> They reject the idea of imputing such an intention to the parties because it would be fair to do so, or because as reasonable man and woman they probably would have had that intention had they thought about it.<sup>49</sup> Instead there must be some evidence suggesting on the balance of probabilities that this common intention existed. This is allegedly a question of fact, rather than imputing an intention which is more like a question of law.<sup>50</sup>

However, it is respectfully submitted that this concept does not help the practitioner know what the law is on many sets of facts. This is because only in rare cases will there be evidence of an oral agreement that a beneficial interest arise. Therefore, in the vast majority of cases, evidence of the existence of a common intention will be derived from the *actions* of the parties. Therefore is there any difference in *practice* between judicial willingness to find an actual common intention from the conduct of the parties (allegedly a matter of evidence) and to a judicial willingness to impute a common intention in 'appropriate' fact situations due to the conduct of the parties (allegedly a matter of law)?<sup>51</sup> Do these different formulae, disclose different judicial practices? As a matter of degree, the N.S.W. Court of Appeal seem to be saying that they are less willing to find actually expressed common intention than the English Court of Appeal. However, it would have been very helpful to know which decisions of the English Court of Appeal decided since 1970 would have been decided differently by the N.S.W. Court of Appeal.<sup>52</sup>

It is submitted that it is very probable that the English Court of Appeal, including the influential and much-respected<sup>53</sup> Lord Denning, would agree completely with the decision in *Allen v. Snyder* though perhaps using different language to reach that result. For example, the

47 In Canada, the public outcry was particularly strong after the 'strict' interpretation of factual common intention in *Murdoch v. Murdoch* (1974) 41 D.L.R. (3d) 367 (Supreme Court of Canada). In apparent response to the public understanding of injustice, and without waiting further upon the hesitant or obstructed legislatures, judicial interpretation changed e.g. *Fiedler v. Fiedler* (1975) 48 D.L.R. (3d) 714; (1975) 55 D.L.R. (3d) 397; *Rathwell v. Rathwell* (1974) 14 R.F.L. 297 (strict interpretation); reversed on appeal (1977) 71 D.L.R. (3d) 509; also list of cases distinguishing *Murdoch* in D.L.R. 1978 Annotation Service.

48 At pp. 690F; 691A.

49 At pp. 690F; 694B; 699F.

50 At pp. 693E; 690F.

51 At p. 693E.

52 Note especially Mahoney J.A. at pp. 705B and 707C.

53 Contra Meagher, Gummow and Lehane, *Equity* (1975) paras 305-306 at pp. 61-62.

English Court of Appeal would almost certainly emphasise the fact that the female's contribution was insubstantial or nothing more than the ordinary *de facto* wife would be expected to do (however much feminists might dislike that concept).<sup>54</sup>

It would have been very instructive for the N.S.W. Court of Appeal to have suggested how much financial or other contribution by the female to the purchase or improvement of the home would have been sufficient evidence to discover a 'subjective' common intention to equally share ownership of the house. \$1000? \$5000? \$20,000? It is certainly far from clear that the amount which will trigger this kind of trust is any different today in the English as compared to the Australian appellate courts.

No doubt that the more substantial and varied is the contribution, the easier for the courts to avoid contentious principles by switching categories to resulting trusts, and thereby avoid searching for in inferring the dubious actual common intention. The contributor can be given a beneficial share (unless there is a clear intention of gift) based upon a valuation of the contribution, generously if necessary, in proportion to the contributions of the legal owner.

##### 5. *Uniform Principles for All Relationships?*

It is suggested in *Allen v. Snyder* that the same rules concerning property apply to 'all property relationships arising out of cohabitation in a home legally owned by one member of the household, whether the cohabitation be heterosexual, homosexual, dual or multiple in nature'. The one qualification is that where a *de jure* husband provides money for the purchase of property in his wife's name then the presumption of advancement applies.<sup>55</sup>

However, it is submitted that this proposition needs some clarification. Although the same general principles apply to both the married and unmarried, the same judicial decision will not necessarily follow where the fact situations are identical with the exception of the marital status of the litigants. For example:

- (i) A *de jure* wife is legally entitled to maintenance according to her need and her husband's ability to pay.<sup>56</sup> However, except in Tasmania,<sup>57</sup> a *de facto* wife is not entitled to maintenance. Thus, it is

54 *E.g. Button v. Button* [1968] 1 All E.R. 1064 ('the ordinary kind of work which a wife might do in the matrimonial home'); *Murdoch v. Murdoch* (1974) 41 D.L.R. (3d) 367 (the ordinary ranch wife); *Eves v. Eves* [1975] 3 All E.R. 769; *Cooke v. Head* [1972] 1 W.L.R. 518 (*de facto* wives did more than 'ordinary' manual labour); *Tulley v. Tulley* (1965) 109 Sol. J. 956 (insignificant weekly financial contributions to buy extras); *Kardynal v. Dodek*, S.C. of Victoria, 12 Dec. 1977, Brooking J.; Comment M. A. Neave, (1978) 11 *Melb. U.L.R.* 580 (small amount of work on house plans, cupboards and garden). Feminists have been quick to point out that thereby culturally 'masculine' women are rewarded, while 'feminine' women are punished.

55 At pp. 689B; 690B.

56 S. 72 of the *Family Law Act 1975* (Com.).

57 *Maintenance Act 1967* (Tas.) s. 16. In South Australia, the *Family Relationships Act, 1975* does not yet extend to inter vivos maintenance.

sometimes accepted that a *de jure* wife, who gives up her right to proper maintenance and lives in some discomfort in order to help finance the matrimonial home, is making a contribution, perhaps a substantial one, which will be recognized in equity.<sup>58</sup>

- (ii) Searching out the actual intentions of a married couple, or group with romantic and/or sexual involvement, will normally be a far more difficult evidentiary process than where the cohabiting parties are strangers. The court should take notice that in romantic entanglements there may be good reasons for property intentions to be sublimated or even ignored. The court should take these subtleties into account when evaluating what amounts to sufficient evidence of common intention.<sup>59</sup>
- (iii) A *de facto* spouse may have a more difficult time than a *de jure* spouse when trying to convince a court that she/her is entitled to a property interest. This is because, firstly, the English judiciary have generally looked upon *de facto* marriages with disfavour, mainly for the reason that they created uncertainty concerning dower and succession rights. Secondly, for moral and public order reasons, a judge may consciously or subconsciously be motivated towards punishing and/or deterring *de facto* unions by being reticent to award property interests to *de facto* wives. You got yourself into this mess — you should have got your marriage certificate first. Don't expect me to help you now.' If so, no doubt a feminist would be quick to point out that given normal social roles in Australian families, male judges are thereby punishing females, while positively rewarding males for entering *de facto* marriages.

Nevertheless, the degree of moral culpability in the claimant, as perceived by the judge consciously and sub-consciously as interpreter of public opinion, is a factor which should not be disregarded.<sup>60</sup> Any detailed facts relating to ethical or reasonable behaviour are a vital aid to prediction of what the law is, ranking perhaps equally with the search for broad principle from precedent.

For example, were one or both of the parties married at the time of cohabitation? If so, did she/he or both subsequently obtain a divorce?<sup>61</sup>

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58 *E.g. Leibrandt v. Leibrandt* (1976) F.L.C. 90-058. (Wife's contributions included living in sub-standard accommodation in order to reduce cost of maintaining her.) Distinction between *de facto* and *de jure* spouses made at least in the headnote of *Richards v. Dove* [1974] 1 All E.R. 888g. Note the possibility that thereby in Tasmania, different trust results may follow where a male has failed to properly maintain his *de facto* spouse in order to finance the home-ante tixt of n. 57.

59 Noted especially by Mahoney J.A. at pp. 705C-706A.

60 The phrase '*de facto* marriage' has a variety of possible meanings each with a different degree of moral approval or disapproval. See C. Foote, R. J. Levy and F. E. A. Sander, *Cases and Materials on Family Law*, (1966) at pp. 266-268.

61 *Horton v. Public Trustee* [1977] 1 N.S.W.L.R. 182 (the woman at least made some bona fide efforts to enquire about divorce).

How relevant is the alleged intention to marry as soon as they are legally free to do so?<sup>62</sup> Was there clear fault on the part of the legal owner in terminating the relationship? How long has the relationship lasted?<sup>63</sup> Have children been born to the relationship?<sup>64</sup> Who will suffer if the claimant *de facto* spouse is successful?<sup>65</sup> How well-known was the *de facto* relationship?<sup>66</sup> To what extent has the relationship involved the traditional incidents of marriage?<sup>67</sup> How much money has the legal owner already paid to the claimant who now seeks further compensation?<sup>68</sup> How old and how healthy are each of the parties?

In relation to this last question, it seems that many *de facto* marriages between older couples, especially if widowed, deserted or divorced, are not against public policy but are often positively to be encouraged. Aged people in a society of predominantly nuclear families are thereby given mutual help and companionship in times often filled with loneliness and sickness.<sup>68a</sup>

As the legal consequences of these relationships are often only tested after the death of one party, (usually the male), courts may choose not to encourage evidence of the exact nature of the relationship, but rather to treat it as a platonic housekeeping affair, which it may well have

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- 62 *E.g. Richards v. Dove* [1974] 1 All E.R. 888 (the arrangement was 'merely one of convenience, with no thought of marriage'); *Cooke v. Head* [1972] 1 W.L.R. 518 (planned to marry when free).
- 63 *De facto* wives have been successful in claiming an equitable interest where for example the relationship has been happy and stable right up until the death of the *de facto* husband *e.g. Horton v. Public Trustee* [1977] 1 N.S.W.L.R. 182; *Olsen v. Olsen* [1977] 1 N.S.W.L.R. 189. Claimants have usually been successful where the relationship lasted for a lengthy period of time after the property in dispute was purchased. *E.g. McRae v. Wholley* S.C. of W.A., 15 August 1975, Jones J. (10 years); *Frazer v. Gough* [1975] 1 N.Z.L.R. 138 (11 years); *Pearce v. Pearce* (1977) 1 N.S.W.L.R. 170 (20 years).
- 64 Claimants have often been successful where children have been born to the relationship. *E.g. Eves v. Eves* [1975] 1 W.L.R. 1338; *Tanner v. Tanner* [1975] 1 W.L.R. 1346; *Valent v. Salamon* S.C. of N.S.W. 8th December 1976; 16 March 1977, Holland J.; contra *Horrocks v. Forray* [1976] 1 W.L.R. 230.
- 65 *E.g. Horrocks v. Forray* [1976] 1 W.L.R. 230 (the deceased's innocent and unaware *de jure* spouse would have been left destitute if the deceased's secret mistress had successfully claimed the home. Moreover, the deceased's illegitimate daughter could later apply against the estate under Testator's Family Maintenance Legislation).
- 66 *Ibid.* (Relationship kept secret).
- 67 *Ibid.* (Visitation rather than cohabitation for 17 years. Also visits from other men).
- 68 *Ibid.* (Legal owner, and various other men, supported woman lavishly for 17 years).
- 68a 'It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected', *Van Alst v. Hunter* 5 Johnson N.Y. Ch. Rep. 159 per Chancellor Kent.

been.<sup>68b</sup> Whatever these 'arrangements' be called, they still perform most of the classic functions of marriage.<sup>68c</sup>

All the factors arising out of this list of questions may assist in giving the claimant credibility as a serious long-term partner in marital consortium with the legal owner, and by no means a gold-digger.

(iv) It is worth noting that there are some authorities, not mentioned in *Allen v. Snyder*, which raise doubts at least concerning strength of the presumption of advancement today. It may be that the presumption can be rebutted more readily than in the past.<sup>69</sup>

### Conclusion

It is submitted that, for the practitioner, *Allen v. Snyder* has not cleared the mist surrounding the question of when an equitable proprietary interest in a home will arise. To repeat, despite the array of apparently different judicial language, the three judges in *Allen v. Snyder* do not specify a single English case since 1970 which they would decide differently on the facts. Are there any common themes discernible within this common practice? Or have the difficult fact situations just not come before the courts to thereby indicate different practice as well as different language. What follows is a suggestion concerning the direction of judicial *practice* as compared to judicial language, in Australia, England, Canada and New Zealand.

At a general level, it is submitted that for this special kind of oral trust to arise, whatever it be called, two elements must be present — namely, intention and contribution. The nature and degree of each can vary. However, if there is clear evidence to affirmatively prove the total absence of either element, that will be fatal, at least at equity. Generally, the more substantial is the contribution,<sup>69</sup> then the less evidence of a factual common intention to create the alleged beneficial interest is necessary. And vice versa — the more evidence of a factual common

68b *E.g. Ogilvie v. Ryan* [1976] 2 N.S.W.L.R. 504 (Housekeeper-spouse cared for aged widower for 10 years; entitled to an interest in his estate by constructive trust mechanism); *Wakeham v. Mackenzie* [1968] 1 W.L.R. 1175 (aged widower cared for by female friend for 3 years before his death; friend contractually entitled to home); *Schaeffer v. Schuhmann* [1972] A.C. 572 (aged widower cared for by housekeeper for 6 months before his death; housekeeper contractually entitled to home) cf. *Maddison v. Alderson* [1881-85] All E.R. Rep. 742; (1883) 8 App. Cas. 467 (aged man cared for by housekeeper for 17 years before his death; contract to give her a life interest held to be unenforceable due to Statute of Frauds); *Horton v. Jones* (1935) 53 C.L.R. 475 (aged man cared for 3 years before death; his promises not enforceable due to vagueness and Statute of Frauds); see generally B. M. Sparks; *Contracts to Make Wills*: (1956), comments in 87 *L.Q.R.* 358; 44 *A.L.J.* 391; 122 *New L.J.* 576; 88 *L.Q.R.* 320; 46 *A.L.J.* 191 and 522; 10 *Uni. of W.A. L.R.* 115. In New Zealand, the promisee spouse has an alternative avenue for a remedy under the *Law Reform (Testamentary Promises) Act* 1949; B. Coote, 'Testamentary Promises Jurisdiction in New Zealand'; A. G. Davis *Essays in Law* (1965. Ed. Northey).

68c Indefinite male-female cohabitation, companionship and mutual help; affection if not sexual fulfilment; rarely procreation.

69 *E.g. Mansfield v. Mansfield* (1966) 110 Sol.J. 831; *Loades-Carter v. Loades-Carter* (1963) 110 Sol.Jo. 51; *Pettitt v. Pettitt* [1970] A.C. 777 at 793, 811, 815, 824; *Falconer v. Falconer* [1970] 1 W.L.R. 1333; *Gissing v. Gissing* [1971] A.C. 886 at 907.

intention then the less substantial need the contribution be (unless the common intention clearly contemplated a substantial contribution).<sup>70</sup>

More particularly, there is probably an equitable proprietary interest in the home where either —

- (a) there is credible evidence that on the balance of probabilities, both the legal owner and the claimant outwardly intended the claimant to have an interest upon making some contribution and subsequently the claimant made that expected contribution, however small,<sup>71</sup> and thereby somehow facilitated the acquisition of the legal title. The size of the equitable interest is determined by the terms of factual common intention. Or —
- (b) the claimant made *substantial contributions* (but more than as 'mere' homemaker and/or parent) directly or indirectly, pecuniary or non-pecuniary, concerning which the legal owner has at least acquiesced, towards the acquisition or improvement of the home and additionally, there is insufficient credible evidence to *negate*, on the balance of probabilities, the existence of an alleged actual common intention to confer a beneficial interest on the claimant. The size of the contributor's equitable interest will be at least in proportion to the value of the contribution (a traditional resulting trust). It may increase towards the share agreed upon in the alleged common intention.<sup>72</sup>

It is important to point out again that this suggested formulation does not represent what at least two judges are saying in *Allen v. Snyder* nor does it represent what may be called the 'orthodox' principles. However, it is submitted that it does reflect what the judges are *doing*, or at least, the direction in which they are moving.

If the Australian Courts are strongly influenced by the language of the majority in *Allen v. Snyder* and thereby show a reluctance to grant a remedy via trust or other mechanism in 'appropriate' situations, then the historical and ongoing problem of the entitlement and needs of the deserted or widowed *de facto* spouse remains (and allegedly grows).<sup>73</sup> The mechanisms for *personal* remedy against the departed spouse are

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70 Clear common intention, without contribution may still amount to a contract.

71 Housework, or parental duties *alone* are not substantial enough; see *ante* n. 54.

72 It is likely that fact situations will far more commonly fit into the second category, rather than the first, though there is obviously a substantial degree of overlap.

73 See *ante* n. 4 concerning increased incidence of *de facto* relationships.

at least potentially available in quasi-contract;<sup>74</sup> tort;<sup>75</sup> contract;<sup>76</sup> proprietary estoppel;<sup>77</sup> perhaps implied partnership;<sup>78</sup> ancillary maintenance and property relief under the *Family Law Act* 1975 (Com.) effected by a broad definition of a marriage void for lack of formalities;<sup>79</sup> or in very limited circumstances, agency.<sup>80</sup>

If the courts attempt to go further than a personal remedy, and try to provide also a remedy effective against third parties,<sup>81</sup> then the issues become more complicated. This is because there is also an historical and ongoing tension between convenient conveyancing practice and the protection of needy and deserving *de jure* spouses, at least before divorce proceedings, and *de facto* spouses at all times. Whenever the lid of certainty is apparently secure on this bubbling pot, a leak springs. Some personal right of a needy spouse is given recognition, and then begins to creep towards being an equivalent to a proprietary right. In the past, this cancer or flower, has temporarily grown under the judicial labels of the now defunct deserted wife's equity;<sup>82</sup> the late unfettered judicial discretion supposedly found in s. 17 of the *Married Woman's Property Act* 1882 U.K.;<sup>83</sup> the unconstitutional jurisdiction under s. 79 (3) of the *Family Law Act* 1975 (Com.)<sup>84</sup> to make discretionary property orders prior to proceedings for principal relief;<sup>85</sup> or at the time of sham proceedings for principal relief.<sup>86</sup>

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- 74 *E.g. Shaw v. Shaw* [1954] 2 Q.B. 429 (C.A.) (damages against estate of a male for breach of implied warranty that male was free to marry); *Stinchcombe v. Thomas* [1957] V.R. 509 (housekeeper successful in quantum meruit claim against estate. Claim limited to 5½ years of wages due to Statute of Limitations); *Degelman v. Guaranty Trust Co. of Canada and Constantineau* [1954] 3 D.L.R. 785 (aunt's promise to devise house unenforceable due to Statute of Frauds; nephew successful in quantum meruit claim against estate of aunt whom he had cared for; *Limitations Act* no bar as action did not accrue until aunt's death).
- 75 Perhaps the tort of deceit where owner intentionally misled claimant concerning who had title *e.g.* facts of *Pearce v. Pearce* [1977] 1 N.S.W.L.R. 170; *Eves v. Eves* [1975] 3 All E.R. 768.
- 76 *E.g. Tanner v. Tanner* [1975] 1 W.L.R. 1346; *Pearce v. Pearce* [1977] 1 N.S.W.L.R. 170; cf. *Horrocks v. Forray* [1976] 1 W.L.R. 230.
- 77 *Ante* nn. 30, 32.
- 78 *E.g.* C. S. Bruch, 'Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services' 10 *Family L.Q.* 101 (1976-77) at pp. 118-121.
- 79 Ss. 60, 71 of the *Family Law Act*; s. 23 (1) (c) of the *Marriage Act* 1961-76 (Com.) *Corbett v. Corbett* (No. 2) [1970] 2 All E.R. 654 at p. 656.
- 80 The presumption of agency arising from keeping house, *Phillipson v. Hayter* (1870) L.R. 6 C.P. 38; *Gage v. King* [1961] 1 Q.B. 188, and therefore applicable to *de factos*, as compared to the 'agency of necessity' arising from maintenance obligations. See *Finer Report of the Committee on One Parent Families*, Cmnd 5629, H.M.S.O. 1974, Vol. 2, at pp. 98-99.
- 81 Most, though not all of which would be called 'proprietary' remedies.
- 82 *Bendall v. McWhirter* [1952] 2 Q.B. 466; overruled by *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1965] A.C. 1175.
- 83 *E.g. Rimmer v. Rimmer* [1953] 1 Q.B. 63; overruled by *Pettitt v. Pettitt* [1970] A.C. 777; *Gissing v. Gissing* [1971] A.C. 886; *Wirth v. Wirth* (1956) 98 C.L.R. 229; *ante* n. 2a.
- 84 S. 79 (3) now repealed by Act No. 63 of 1976.
- 85 *Russell v. Russell*; *Farrelly v. Farrelly* (1976) 50 A.L.J.R. 594; 9 A.L.R. 103; (1976) F.L.C. 90-039.
- 86 *In the marriage of Read* (1977) F.L.C. 90-201; overruled by *In the marriage of Tansell* (1977) F.L.C. 90-307; comment (1978) 16 *Law Soc. J. (N.S.W.)* 233.



The current categories for reducing the tension are some kind of trust,<sup>87</sup> contract,<sup>88</sup> and especially for *de jure* spouses, s. 114 (1) and (3) of the *Family Law Act*.<sup>89</sup> No doubt tort,<sup>90</sup> contempt of court,<sup>91</sup> 'fraud' under the Torrens system,<sup>92</sup> 'fraud' at common law,<sup>93</sup> protected tenancies for under three years;<sup>94</sup> and s. 85 of the *Family Law Act 1975* (Com.)<sup>95</sup> await on the sidelines as largely untested reserves in case of injuries. In other words, the social tension will not go away.

So the cry goes up yet again — the state of the law is unsatisfactory and in need of legislative attention.<sup>96</sup> Yet it is likely that many more litigants will be sacrificed to legal uncertainty and costs before the cry is effectively heeded.<sup>97</sup>

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- 87 *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685; *Eves v. Eves* [1975] 1 W.L.R. 1338.
- 88 *E.g. Tanner v. Tanner* [1975] 1 W.L.R. 1346; *Pearce v. Pearce* [1977] 1 N.S.W.L.R. 170; cf. *Horrocks v. Forray* [1976] 1 W.L.R. 230. This raises the question of when a contractual right is such that it can be protected by caveat? *E.g. King v. David Allen & Sons, Billposting Ltd* [1916] 2 A.C. 54; *Cowell v. Rosehill Racecourse* (1937) 56 C.L.R. 605. How should the interest be described? *Vandyke v. Vandyke* (1976) 12 A.L.R. 621; P. Butt, 'Drafting Caveats' (1977) 15 *Law Soc. Journ. (N.S.W.)* 329.
- 89 *E.g. In the Marriage of McCarney* (1977) F.L.C. 90-200; *In the Marriage of Tansell* (1977) F.L.C. 90-307. It remains unclear how many *de facto* marriages could be classified as marriages void for lack of formalities (*Marriage Act 1961-76* (Com.) s. 23 (1) (c)), and therefore within the jurisdiction of the *Family Law Act 1975* (Com.) ss. 60, 71.
- 90 Perhaps the tort of inducing a breach of contract. *E.g. Binions v. Evans* [1972] 2 W.L.R. 729 (purchaser with notice of tenant's rights could not evict her as this would be the tort of interference with existing contractual rights).
- 91 *E.g. Obit of Russell L.J. in National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1964] 1 All E.R. 688 at 704. He suggested an injunction obtained by a wife should be registrable at the Land Titles Office and further 'it may be that, if a lender [or other third party] had actual notice of an injunction restraining a husband from disposing of the property so as to undermine his wife's position, he would be party to the husband's contempt, and could purge it only on terms which would secure the wife in occupation'.
- 92 *E.g. s. 43 of the Real Property Act 1900* (N.S.W.); P. Butt, 'Notice and Fraud in the Torrens System: A Comparative Analysis' (1978) 13 *W.A. Law Rev.* 354.
- 93 *E.g. Ferris v. Weaven* [1952] 2 All E.R. 233 (assignment for nominal sum, to defeat the contractual license of the occupant wife ineffective); approved of in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1965] A.C. 1175 at pp. 1258-59 (Lord Wilberforce).
- 94 *E.g. Real Property Act 1900* (N.S.W.) s. 42 (d); *Pearce v. Pearce* [1977] 1 N.S.W.L.R. 170; *Tanner v. Tanner* [1975] 1 W.L.R. 1346.
- 95 The court has power to set aside a transaction which has the effect of defeating a claim for maintenance or division of property.
- 96 *E.g.* at p. 701C. See now *inter alia* the Western Australian legislative response — The Family Law Act Amendment Bill, 1978; the response in New Zealand — *The Matrimonial Property Act*, No. 166 of 1976; the less successful Victorian response in s. 161 of the *Marriage Act 1958-1962* (Vic.) discussed *inter alia* in R. Sackville, 'The Emerging Australian Law of Matrimonial Property', (1970) 7 *Melb. U.L.R.* 353 at p. 358.
- 97 On 25th March, 1977, a joint Federal-State Committee was appointed by a meeting of the Federal and State Attorney-General to report *inter alia* on referral of the constitutional power by the States to the Commonwealth to deal with family law matters which at present can now be dealt with only by State Courts. In 1978, a Joint Select Committee of the Federal Parliament was appointed to enquire into numerous aspects of family law including property. See generally J. Wade, 'Jurisdiction Under the Family Law Act to Make Orders Affecting Property in the Absence of Proceedings for Principal Relief' (1977) 5 *U. Tas. L.R.* 248.

It is important to note that the Federal Parliament acting alone probably cannot effect reform concerning property rights of unmarried persons such as the parties in *Allen v. Snyder*.<sup>98</sup> It may be thought that the doctrine of division of powers within government is a convenient incentive to passing the buck. Yet even a judge willing to reflect changing public opinion is ultimately limited by the boundaries of the remedies offered by trust and contractual principles.<sup>99</sup> Should the courts consider consciously electing to make a series of decisions denying a *de facto* wife an interest in property or any personal remedy which thereby so outrage the public that legislative response is precipitated?<sup>100</sup>

In reality, denial of interests to 'merely' *de facto* wives who have contributed to the matrimonial home may cause less than a ripple in Australian public opinion. This is because, unlike the Canadian situation, only a relatively tiny proportion of socially accepted *de jure* wives in Australia would thereby be effected. The vast majority of *de jure* spouses face a lesser degree of uncertainty and perceived injustice when a 'just and equitable' division of their property is effected under the *Family Law Act* and will certainly have all their contributions legally recognised.<sup>101</sup>

Meanwhile, when advising a *de facto* spouse and negotiating towards a settlement, a practitioner faces the daunting task of deciding what are the legally relevant facts, how many conceptual pigeonholes will suit those facts and then predicting what are the likely patterns of judicial behaviour, when confronted with those facts.

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98 Under the *Commonwealth of Australia Constitution Act 1900* (63 & 64 Vic. Ch. 12) s. 51 (xxi) - (xxii) the Federal Parliament only has jurisdiction over void marriages which arguably make up only a small proportion of *de facto* marriages. However it has not yet been decided what kinds of *de facto* marriages come within the concept of 'void' marriage and the federal constitutional power over 'marriage'. See Windeyer J. in *A-G for Victoria v. The Commonwealth* (1932) 107 C.L.R. 529. Even with *de jure* marriages, federal jurisdiction over property is limited until proceedings for principal relief are commenced — *ibid.* Wade.

99 The largely unexplored doctrine of proprietary estoppel offers some hope of flexibility — see *ante* nn. 30-32.

100 Compare the public and legislative response to the 'ordinary ranch wife' cases in Canada *e.g.* *Rooney v. Rooney* (1969) 68 W.W.R. 641; *Rathwell v. Rathwell* (1974) 14 R.F.L. 297; *Murdoch v. Murdoch* (1974) 41 D.L.R. (3d) 367; *ante* n. 47.

101 S. 79 (4) (b) '... the court shall take into account the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party, including any contribution made in the capacity of homemaker or parent'. Also s. 75 (2) (j).