The Law Commission

Working Paper No. 90

Family Law

Transfer of Money Between Spouses — the Married Women's Property Act 1964

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This Working Paper, completed on 12 February 1985, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

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CONTENTS

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TRANSFER OF MONEY BETWEEN SPOUSES - THE MARRIED WOMEN'S PROPERTY ACT 1964

INTRODUCTION

1.1 The Family Law (Scotland) Bill now before Parliament contains provisions which, if enacted, will repeal the Married Women's Property Act 1964 so far as Scotland is concerned and replace it with an amended version, following the recommendation of the Scottish Law Commission.[1] This provides a timely opportunity to review the provisions of the Act to see whether there is a case for amendment in English law. It is now twenty-one years since the Act was passed. There have been many social and legal changes during these years particularly with regard to marriage and matrimonial law. It is time to see whether what was passed in 1964 is well suited to conditions in 1985. However, we have not confined ourselves to a review of that Act. Rather, we have re-examined the problems with which that Act was intended to deal to see first whether the problem still exists, and secondly whether there are other solutions which could be devised for it.

1.2 We should first make clear the limits of the discussion in this paper. We are not intending to consider here the ownership of all money or property of married couples, an area where we have already done much work.[2] This exercise is intended to be more limited in scope and to deal with one specific legal and social problem. That problem is the legal effect of the transfer of money from one spouse to another and the ownership of property bought with that money. The discussion and our proposals relate only to married couples and not to cohabitants. After a

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1 Scot. Law Com. No. 86, para. 4.16.

2 Law Com. No. 86.

general discussion as to whether reform is needed in this area, we shall first consider specific reforms of the Married Women's Property Act 1964 and secondly make some tentative proposals for more far-reaching change.

THE NATURE OF THE PROBLEM

2.1 Since the Married Women's Property Act 1882, husbands and wives have been treated as separate legal persons and except where there has been statutory intervention, questions as to the ownership of their property are settled by reference to normal property law. Where money is handed over by one spouse to another, the effect of that transfer depends on the purpose for which it was made and who makes it. Before the Married Women's Property Act 1964, if it was a transfer to the wife for housekeeping purposes, then in the absence of evidence that a gift was intended, she was deemed to be acting as her husband's agent in spending the money and any property bought with it, and any surplus, belonged to him.

2.2 The cases which established this were Blackwell v. Blackwell[3] and Hoddinott v. Hoddinott.[4] In Blackwell v. Blackwell, where a wife had saved money with a co-operative society in her name out of her housekeeping allowance, it was said that, "[i]t is clear law that savings made by a wife out of money handed to her by her husband for housekeeping purposes belong to the husband".[5] In Hoddinott v. Hoddinott, the husband and wife were in the habit of using the savings from the housekeeping money to enter the football pools. A dispute arose as to the ownership of furniture bought with some winnings. The case was largely decided in terms of whether there was a contract between the parties, but in the course of his judgment, Bucknill L.J. said,

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3 [1943] 2 All E.R. 579.

4 [1949] 2 K.B. 406.

5 [1943] 2 All E.R. 579, 580, per Luxmoore L.J.

"First I am not at all satisfied that she had got any legal interest in the housekeeping money as such. The money belonged to the husband, and I should have thought she held it in trust for him for keeping them both, and if the husband decides to take some of it away from the purchase of food and such things to invest it in football pools, it seems to me that in the absence of any contract between them the proceeds or winnings on that housekeeping money also belong to him".[6] It may be, as suggested by Kahn-Freund,[7] that these cases were a result of a failure to appreciate the impact of the Married Women's Property Act 1882, but they were and are accepted as valid statements of the law as it was before the Married Women's Property Act 1964.

2.3 By contrast, if a wife makes a transfer to her husband for household purposes it would appear that the money becomes his, unless there is evidence of a contrary agreement.[8] There are no recent cases on this point and it may be that either a court would not now follow the older cases, or they would be very ready to find an agreement to the contrary. Until there is such a case or until there is legislation on this point, it must be assumed that the law is as stated in those cases.

2.4 Where money is transferred from husband to wife for purposes other than housekeeping, then the wife is likely to become the owner. If there is evidence that the husband intended a gift, she becomes the owner as a result of his intention. Even if he did not actually intend a gift, or if there is no clear evidence of his intention then his wife will probably become the owner through the operation of the presumption of advancement. However, if the situation is reversed so that the wife has

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6 [1949] 2 K.B. 406, 410.

7 "Inconsistencies and injustices in the law of husband and wife", (1953) 16 MLR 34.

8 Edward v. Cheyne (No. 2) (1888) 13 App. Cas. 385, HL; Re Young (1913) 29 T.L.R. 319.

transferred money to her husband, and there is no evidence of a gift, she retains beneficial ownership as the law presumes that he holds it on resulting trust for her.

Statutory Intervention

2.5 The Married Women's Property Act 1964 altered the law as set out in para. 2.1 above. Since 1964, money derived from an allowance made by a husband to his wife (but not vice versa) and any property acquired with it, is owned by them both.[9] Apart from that Act, the law remains as outlined in the preceding paragraphs.

THE NEED FOR REFORM

3.1 The present law relating to the transfer of money between spouses is discriminatory. The 1964 Act applies only to an allowance made by a husband. As shown in para. 2.3, the common law as to transfers from wife to husband for similar purposes is less favourable to the wife than the Act is to the husband. For other transfers the presumption of advancement applies only where money is transferred to the wife. Such discrimination would not be acceptable in legislation passed today.

3.2 The intention of any reform should be, not to create more difficulties than exist at present by laying down arbitrary new rules, but to create rules which will give results which are acceptable to the majority of couples without imposing the rules on people who wish to make different arrangements. While there is little direct evidence, and this is a point on which we especially seek views, it seems likely that the present discriminatory law would not comply with most people's expectations.

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9 The whole Act is set out at Appendix A.

3.3 The financial arrangements of married couples vary widely. The law does not provide any clear rules as to the effect of the many different arrangements possible. Except where the 1964 Act applies, the normal law of property determines ownership. Where matrimonial property is concerned, people are unlikely to have considered the legal consequences of their transactions, and determining what those consequences should be, perhaps years after the event, may be very difficult. It may be that because private arrangements vary so much, it is difficult to devise any rules which will not cause more problems than the present law. We do seek views on this point, but at present we believe that clearer rules in this area would be of benefit to married couples.

3.4 While the present law may be said to be unsatisfactory, it could be argued that there is no need for reform because disputes are likely to arise on the breakdown of the marriage and there is ample legislation to do justice between the parties. Although legislation is available when a marriage breaks down, some of us are convinced that there is still value in defining the rights of the parties during marriage. Important property questions may arise on the death or bankruptcy of a spouse. Property rights may affect provision on divorce particularly where the sums involved are too small to warrant court proceedings. Even apart from these events, defined property rights may set a standard for the majority of marriages which do not break down during the lifetime of the parties. In our Third Report on Family Property, it was stated that "...it is a poor and incomplete kind of marital justice which is excluded from continuing marriage relationships and allowed to operate only when those relationships end".[10] The importance of legislation defining rights during marriage has recently been reaffirmed.[11] We would welcome views as to the value of legislation defining rights during marriage.

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10 Law Com. No. 86, para. 0.11.

11 Law Com. No. 115; Cmnd. 8636.

THE MARRIED WOMEN'S PROPERTY ACT 1964

The Origins of the Act

4.1 The origins of this Act lie in the Report of the Royal Commission on Marriage and Divorce.[12] The Royal Commission after outlining the existing law said that, "[a]s witnesses have pointed out, this rule has worked unfairly in a number of recent cases. We think that it is not in accord with the view of marriage as a working partnership, and that the right way is to look upon such savings as belonging half to the husband and half to the wife."[13] They recommended, "in respect of England and Scotland that savings made from money contributed by either the husband or the wife or by both for the purpose of meeting housekeeping expenses (and any investments or purchases made from such savings) should be deemed to belong to husband and wife in equal shares unless they have otherwise agreed".[14]

4.2 The Government indicated in 1963 that they would have no objection to a Private Member's Bill in those terms, and Baroness Summerskill introduced the Married Women's Savings Bill in 1963, the main clause of which read "if a wife makes savings out of what her husband gives her for housekeeping, half of any money so saved shall belong to her absolutely".[15] This clause is quoted here because it provides an interesting comparison with what was eventually enacted. The Bill fell at the end of the session owing to lack of time. The Married Women's Property Bill was introduced after advice had been taken during the Summer recess. The wording was now very different. The main clause said "If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses

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12 (1956) Cmd. 9678.

13 Ibid. para. 700.

14 Ibid. para. 701.

15 The Bill is reproduced as Appendix B.

of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to the husband and wife in equal shares."[16] The Bill was only debated in the House of Lords where it was not amended.[17] It received the Royal Assent and came into force on 25 March 1964.

4.3 Since it was passed the Act has received little attention. There are only two reported cases Tymoszczuk v. Tymoszczuk[18] and Re Johns' Assignment Trusts.[19] These are considered further below. It has attracted little academic attention, being noted by Stone,[20] discussed by Deech[21] and by Kahn-Freund,[22] referred to by Cretney,[23] and considered in the standard textbooks.[24]

Criticisms of the Act

4.4 The obvious criticism of the Act is that it dealt with such a narrow area of matrimonial property when there were other more important areas in need of reform. The Royal Commission on Marriage

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16 See Appendix A.

17 Hansard (H.L.), 26 November 1963, Vol. 253, col. 633.

18 (1964) 108 S.J. 676.

19 [1970] 1 W.L.R. 955. A Lexis search revealed only one further reference, a passing mention in Pettit v. Pettit [1970] A.C. 777 at p. 789.

20 O.M. Stone (1964) 27 M.L.R. 576.

21 R.L. Deech, "Matrimonial Cash Problem", (1973) 123 N.L.J. 1107.

22 O. Kahn-Freund, Matrimonial Property - where do we go from here? 1971, The Josef Unger Memorial Lecture, University of Birmingham.

23 S.M. Cretney, "The codification of family law", (1981) 44 MLR 1.

24 S.M. Cretney, Principles of Family Law 4th ed., (1984), p. 685 and P.M. Bromley, Family Law 6th ed., (1981), p. 427.

and Divorce had made wide-ranging recommendations relating to the occupation of the matrimonial home during marriage and on divorce, and had recommended that the court should have a power to transfer tenancies, and divide the contents of the matrimonial home on divorce.[25] To criticise the Act on this basis is to ignore the reality of the prospects of further legislation at that time. The opportunity was taken to implement one small recommendation. A wider Bill would not have been given Parliamentary time. Nevertheless, some criticisms can be made of the Act.

4.5 The Royal Commission's recommendations referred to husbands and wives equally. The Act applies only to allowances made by husbands. Baroness Summerskill was only concerned with the plight of dependent wives and wanted her Act to be as short as possible. Legislation of such a discriminatory nature would not be acceptable today.

4.6 The phrase "expenses of the matrimonial home" is vague and made even more so by the addition of the words "or for similar purposes". This has given rise to the suggestion that mortgage payments may be an expense of the matrimonial home. This suggestion was rejected by Master Jacob in Tymoszczuk v. Tymoszczuk.[26] In this case the husband gave his wife all his earnings and she paid all the family expenses out of them, including the mortgage payments. She left him and claimed a share of the house. Master Jacob held that the mortgage payments were not an expense of the matrimonial home. In Re Johns' Assignment Trusts[27] the first matrimonial home had been bought in the husband's name with a deposit saved by the wife out of what her husband had

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25 (1956) Cmd. 9678, paras. 662-698.

26 (1964) 108 S.J. 676.

27 [1970] 1 W.L.R. 955.

allowed her during the first five years of marriage (when they had lived with his parents). The mortgage instalments were paid by the wife out of her wages and money given to her by her husband. That house was sold and another purchased in their joint names, legally and beneficially, paid for by the proceeds of sale of the first house and a mortgage advance. Those mortgage instalments were paid from the profits of a business owned by the wife. Goff J. held that the express trust must take effect. The wife had argued in the alternative that the 1964 Act gave her a half share. Goff J. doubted whether the Act could apply retrospectively but did say, "I must not be taken as accepting the view that where section 1 does apply, moneys paid to discharge a mortgage on the marital home are not expenses of the matrimonial home or expenses for similar purposes within the section".[28]

4.7 How far does property acquired with money derived from the allowance extend? How would the Act affect a case like Hoddinott v. Hoddinott?[29] We would suggest that "property acquired" is wide enough to cover, for example, winnings on the football pools. It must be intended to be wider than "property bought". Whether it would have given Mrs. Hoddinott a share of the winnings must depend on whether the stake money was "derived from" the allowance or a part of the allowance itself. Even if it was derived from the allowance, the Act might have been excluded by a tacit agreement to the contrary. In Re Johns' Assignment Trusts[30] and Tymoszczuk v. Tymoszczuk[31] the purpose for which money had been given to the wives was not considered. It is arguable that if the money had been given for the purpose of making mortgage repayments, the Act could not have applied to the houses purchased with it because they were bought not with money derived from the allowance but with the allowance itself. These problems illustrate the difficulty involved in the phrase "money derived from" an allowance.

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28 [1970] 1 W.L.R. 955, 960.

29 [1949] 2 K.B. 406.

30 [1970] 1 W.L.R. 955.

31 (1964) 108 S.J. 676.

A woman might buy something with the allowance by paying for it in weekly instalments. Alternatively she might save a part of the allowance each week and then buy it. In the second case it has clearly been acquired with "money derived from" the allowance. Has it in the first? Or has it been bought with the allowance itself?

4.8 The money or property derived from the allowance is to be held in equal shares which means that the husband and wife hold it as tenants in common. Each spouse can therefore leave it in his or her will to anyone he or she chooses. If they were to hold as joint tenants, the automatic right of survivorship would apply so that the surviving spouse would take regardless of the terms of the deceased spouse's will. It does not appear that either the Royal Commission or Baroness Summerskill considered which would be the more appropriate form of interest, a matter which we will consider further below.[32]

4.9 The Act did not state whether it was to apply retrospectively, so that one does not know whether savings made before it came into force are affected by it or not. This may now be a matter of less practical importance.

The need for reform of the 1964 Act

4.10 Some shortcomings in the Act have been demonstrated and from that point of view there is a case for a measure of reform. However, there are arguments against and these must be considered before the possible changes.

4.11 The Act has given rise to few reported cases. This might be said to indicate that it is of no importance, but the level of reported cases is neither the only nor the best indicator of the importance of legislation. A statute may not give rise to litigation because when informed of its provisions people may be willing to comply with them. It may have

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32 Para. 4.17.

altered practice as to the normal way to treat matrimonial savings. We simply do not know.[33] Furthermore if it could be proved that the Act has hardly been relied upon in the last twenty years but it could be shown that the problem with which it attempted to deal still exists, then a reformed version might be of more use.

4.12 It could be argued that the problem with which Baroness Summerskill was concerned no longer exists to any extent sufficient to justify amending legislation. She said "My original approach to this [the Bill] was to help those wives - and I think they are in the great majority - who work at home, who cook, clean, wash and serve the family for unlimited hours, but who are not legally entitled to save one penny in their own name".[34] Superficially it might appear that the problem no longer exists to any appreciable degree. In 1961, only 29.7% of all married women were in paid employment or looking for paid employment, but in 1981 the figure was 49.5%.[35] Legislation enables a married woman to apply for a share of her husband's property when the marriage breaks down during their lifetimes or on death. However, although so many more married women are in paid employment, many are not; of those who are, many work part-time, and if they work full time they are likely to earn less than men. Women's average earnings (excluding the effect of over-time which would increase the difference) are about 74%

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33 In 1972, those questioned as to who should keep savings from a wife's housekeeping allowance were equally split between those who thought they should all belong to the wife and those who thought they should belong equally to both spouses. Of those who thought they knew the law most thought the savings would belong to the husband. Perhaps these findings do show that while the 1964 Act is not well known, its principles do accord to some extent with public expectation. J.E. Todd and L.M. Jones, Matrimonial Property, (1972), pp. 31-32.

34 Hansard (H.L.), 26 November 1963, vol. 253, col. 634.

35 OPCS, Social Trends 14, (1984), p. 58.

of men's.[36] Although the completely dependent woman of 1964 may be a less common phenomenon today, most married women are dependent on their husbands at least some of the time, to at least some extent. While they are dependent, they are likely to receive a housekeeping allowance. A recent study[37] has highlighted how little is known about financial matters during marriage. Four broad types of arrangement appear: the whole wage system, where the wife is given all the money and hands back some for her husband's own use; the allowance system, where the husband gives his wife money each week; the pooling system where earnings and decisions about money are shared; and the independent management system where each pays for certain items. In some households the wife receives no housekeeping: the husband pays for all the food and other expenses. However, despite the lack of quantitative data it seems likely that a large number of women receive a housekeeping allowance during part or all of their marriage.

4.13 Is other legislation adequate? We have already explained why, for some of us, it is not sufficient to legislate for matrimonial breakdown alone.

POSSIBLE REFORMS

The Scottish Approach

4.14 The Scottish Law Commission has recommended two changes to the Act:-

(i) the Act should apply equally to husband and wife;

(ii) the phrase "expenses of the matrimonial home" should be replaced by the phrase "joint household expenses".

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36 Ibid., p. 74.

37 J. Pahl, "The allocation of money within the household", in M. Freeman, (ed.) The State, the Law and the Family: Critical Perspectives, (1984) and see also J. Pahl, "Patterns of Money Management within Marriage", (1980) 9 J. Soc. Pol. 313.

4.15 We would recommend that the Act should be amended so as to apply equally to husband and wife. Such a change would comply with the original recommendation of the Royal Commission and would bring the Act into line with recent matrimonial legislation.

4.16 As to the second of the Scottish reforms the suggestion that the phrase should be "joint household expenses" results from the particular definition of "matrimonial home" which has been recommended for Scotland. In the context of our wider proposals, we make a suggestion as to a different phrase which might be used. Where amending the 1964 Act is concerned, there do seem to be advantages in the Scottish wording as it could include, for example, the family holiday, or the expenses of the family car.

4.17 We would welcome views on some further reforms of the Act.

(i) Joint Tenancy or Tenancy in Common?

As we have said, there does not seem to have been any discussion as to which is preferable. It may be unimportant, because generally a spouse's half share will pass to the other spouse by will or on intestacy. Joint tenancy may represent what most couples want, although such evidence as there is relates only to the matrimonial home.[38] On the other hand, severance of a joint tenancy is not always a simple matter[39] and this may mean that the imposition of a joint tenancy would cause unnecessary problems. We have as yet formed no conclusions on this point.

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38 J.E. Todd and L.M. Jones, Matrimonial Property, (1972), p. 11 and A.J. Manners and I. Rauta, Family Property in Scotland, (1981), p. 5.

39 See, e.g. Harris v. Goddard [1983] 1 W.L.R. 1203.

(ii) Retrospective Effect

Should the Act apply retrospectively or prospectively and should any reforms of it apply retrospectively or not? As a matter of general principle, retrospective legislation has been thought to be undesirable. In this particular case it would alter existing property rights. On the other hand, in practical terms it may be difficult to restrict it so that it applies prospectively. It would mean that where, for example, a man has made savings out of an allowance made to him by his wife, all savings made up to the time the reforms come into operation may belong to him, and any made after will belong to them jointly. This could give rise to difficult problems of evidence. We would very much welcome views on this point.

FURTHER REFORMS

5.1 Consideration of the Married Women's Property Act 1964 in particular and the transfer of money within a marriage in general has led us to contemplate a more substantial reconsideration of the principle which the Act represents and to propose some further reforms on which we seek views. We have not reached any firm conclusions on the desirability of these reforms but welcome comment and criticism both on the general principles involved and on the details.

Money Transferred from One Spouse to Another

5.2 The problem discussed at the beginning of this paper was that of determining the legal consequences of the transfer of money between spouses. The 1964 Act only dealt with one aspect of such transfers. We

would suggest that the legal consequences should be determined in accordance with the purpose for which the transfer was made, and that most transfers are for one of two purposes:[40]

(i) for joint purposes of the couple; or

(ii) for the sole use of the transferee.

Transfers for Joint Purposes

5.3 Where at present money is transferred for the expenses of the matrimonial home, co-ownership only attaches to the surplus left after those expenses have been met. We would suggest that this issue could be tackled a different way, by giving the spouses equal rights to the money before it is spent. This would have the following advantages:-

(i) It lays down a clear principle and in so doing abolishes any lingering suggestion that a wife acts merely as an agent when spending the house-keeping money.

(ii) It is easier to operate, because it removes the difficulties inherent in the 1964 Act of determining at what point money is "derived from" an allowance.

(iii) It is able to cope with different systems of domestic finance. It gives an equally satisfactory result where one spouse hands over his or her entire wages to the other, and where they pool their resources. It seems likely that it will be able to cope more satisfactorily with any future changes in the patterns of finance in the family.

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40 There may, of course, be transfers where it is intended that one spouse act as the agent of the other, as for example, where a husband asks his wife to go and buy tobacco for him. Our proposals would not affect this situation.

5.4 The impact of this proposal on ownership of household goods and on the matrimonial home is discussed below. It should not however be thought that the proposal involves co-ownership of all money. The money must be transferred for joint purposes. Further, we consider that it should not be an absolute rule but should give way to any agreement to the contrary. A more detailed consideration of the proposal is set out below.

The Details

5.5 Money or property acquired with it Property acquired with the money should be co-owned in the same way as the money itself is co-owned. Property acquired with the money in effect represents the money and it would be illogical not to extend co-ownership so far. The effect would therefore be to impose co-ownership on some household goods of married couples, and in some cases on the matrimonial home, a matter which is considered in more detail below.[41] Where chattels are concerned we provisionally recommend that, if acquired with money made available for a purpose within the provision and that, of course, would include money made available to buy the chattel itself if it is a joint one, they should be jointly owned at law, and not merely in equity. There are no special formalities required to create legal interests in chattels and we do not think there is any difficulty in creating legal co-ownership by statute. If a spouse were to acquire an interest in equity only, this would introduce a trust, and this seems to us an unnecessary complication. However, where land is concerned legal title can only be conferred by deed (and where title is registered, by registration) and it would be difficult to confer legal title by statute. Where land is concerned we therefore suggest that any title acquired as a result of this proposal should be equitable only. The effect on third parties is considered below at para 5.22.

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41 Para. 5.20.

5.6 The transfer We have been using the word "transfer". This may be unduly restrictive and we would suggest the phrase "made available" which would cover a wide range of circumstances, as for example where a spouse is permitted to draw on the other spouse's bank account.[42] It would also enable the proposal to cover the arrangements some couples adopt whereby they create a notional pool of their resources. In other words they do not pay money into a joint bank account but each pays for separate items, for example one may pay the mortgage and fuel bills while the other buys food and saves for their holiday. Where both spouses use their income for joint purposes[43] in this way we would suggest that all the money so used should be considered to be made available for joint purposes. The impact of this on the matrimonial home is discussed further below.[44]

5.7 Indirect contributions In the context of the matrimonial home it is accepted that a spouse may acquire an interest through an indirect financial contribution.[45] If for example the husband pays the fuel bills and the wife is therefore able to use her earnings to pay the mortgage, he will acquire an interest in the house. It is necessary to consider the relationship between this established area of law, and our suggestion in the previous paragraph that in such circumstances both spouses should be considered to be making money available for joint purposes. Where there is an indirect contribution, as in our example, the present law gives the contributing spouse an interest proportionate to the value of his contribution. If that contribution alone was treated as money made available then the proposal contained in this paper would give the husband

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42 Para. 5.19.

43 Para. 5.13.

44 Para. 5.20.

45 Fribance v. Fribance (No. 2) [1957] 1 W.L.R. 384, Gissing v. Gissing [1971] A.C. 886, Burns v. Burns [1984] 2 W.L.R. 582.

an interest based on only half the value of his contribution, as property acquired with money made available for joint purposes is to be equally owned and the property acquired (albeit indirectly) with his payment is the share of the house that that money has indirectly paid for. We think it is likely to be unacceptable that the law should be altered so that a spouse acquires only half of what he or she now acquires.

5.8 We seek views on this point but at present we consider that the solution lies in the concept of a notional pooling of resources. As Lord Denning M.R. put it, "the title to the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happen to allocate their earnings and their expenditure. The whole of their resources were expended for their joint benefit ... and the product should belong to them jointly".[46] The principle should be that wherever money is made available for joint purposes by both spouses that money and property acquired with it should be jointly owned, so that when money is paid towards the purchase of the matrimonial home, towards which both are contributing, that should give rise to co-ownership of the matrimonial home, subject to a contrary agreement.

5.9 An alternative solution would be to exclude indirect contributions altogether, and to leave the law in this area alone. The courts have already worked out a reasonably effective way of dealing with indirect contributions and it may be that no change is necessary. However, even if indirect contributions are excluded, some idea of a "notional pool" may have to be introduced to avoid problems with direct contributions to the acquisition of property in the name of the other.

5.10 The cases make it clear that in order to be treated as an indirect contribution, the contribution must be in money or money's worth, and that performing services such as child care or housework

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46 Fribance v. Fribance (No. 2) [1957] 1 W.L.R. 384, 387.

does not amount to making an indirect contribution. While there is room for considerable argument as to whether the approach of the courts has been right in this area, it would seem undesirable for our present proposals to take a different approach. To take a very wide approach to indirect contributions could be tantamount to recommending co-ownership of the matrimonial home in nearly all cases. Apart from the fact that this is an issue on which we have already reported at length, it is not a change that can be readily recommended in the context of proposals aimed at clarifying the law on the transfer of money between spouses.

5.11 Direct contributions to property in the name of the other spouse Similar arguments apply where one spouse makes a direct financial contribution to the purchase of the matrimonial home. If only that contribution is treated as money made available, the interest he or she acquires with it would be equally owned by both spouses instead of solely owned by him or her as at present. Again where both spouses are paying towards something for their joint use we would suggest that payments by both spouses should be seen as being made available for joint purposes, subject to contrary agreement.

5.12 Where there is no pooling of resources If carried to extremes the suggestions discussed above could lead to co-ownership of all matrimonial homes because even where one spouse pays all the family expenses out of his or her earnings, it could well be said that the matrimonial home is still a joint purpose and money has been made available for it. However we do not consider it appropriate that in such a case co-ownership should apply as a result of this proposal. Our intention in making this proposal is to clarify and improve an unsatisfactory area of law, not to impose co-ownership on people who have given no indication that they are treating money as joint money. How can this situation be excluded and the "notional pool" included in the concept of "money made available"? We would tentatively suggest that in order for the money (and property acquired with it) to be co-owned it must either be made available to the other spouse or the spouses must both be making financial contributions for their joint purposes. In both cases it seems reasonable

for the law to infer that the spouses are not treating such money or property as individual assets and it will always be open to a spouse to prove that they had an agreement that their financial arrangements were not intended to give rise to co-ownership.

5.13 For what purpose? The 1964 Act refers to an allowance for the "expenses of the matrimonial home or other similar purposes". The Scottish Bill refers to "joint household expenses". It is clear that the definition of the purpose for which money must be paid before our proposal has effect is crucial. Too narrow a definition and the proposal will have little effect. Too wide a definition and it may be thought that we are suggesting a general community of property. While we prefer the Scottish phrase to that in the 1964 Act, we are not convinced that the addition of the word "household" is necessary. However, the phrase "joint expenses" might carry the implication that only those matters for which the spouses are jointly liable are included, which is not our intention. On balance, we favour the phrase "joint purposes". We consider that this phrase is wide enough to include those things such as family holidays which we think most people would accept as joint expenditure, while not interfering with a spouse's ability to use money for his or her purposes without creating co-owernship.

5.14 Mortgage instalments Whatever phrase is used payments towards mortgage instalments should be included. There seems no good reason why they should not be. In two separate surveys, it has been shown that even where the matrimonial home is in one name only, the overwhelming majority or husbands and wives thought of the home as belonging to them jointly.[47] The mortgage instalments are hardly a private matter for one spouse - the non-owner spouse has a right to pay them and a right to be informed of proceedings relating to them.[48] If

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47 87% in Todd and Jones, Matrimonial Property, (1972), p. 11, 85% in Manners and Rauta, Family Property in Scotland, (1981), p.5.

48 Matrimonial Homes Act 1983, s.1(5) and s.8.

mortgage instalments are included, should any distinction be made between repayment and endowment mortgages and between payments of interest and payments of capital? We suggest that no such distinction should be made.[49] Payments of interest, capital and insurance premiums are all made in order that a valuable asset, the house, may be retained and distinguishing between them is unwarranted.

5.15 Purchase of chattels by instalments In principle there seems to us no reason to exclude the purchase of chattels under a hire purchase contract or other credit agreement from the provision. If the chattel is for joint use, then money made available for payment of instalments toward its purchase is made available for joint purposes. However there may be some problems as to the effect on third parties of bringing such instalments within the provision. These are discussed further at para. 5.23 below.

5.16 Joint tenancy or tenancy in common The same question arises as discussed earlier and the same considerations apply as to whether the appropriate form of co-ownership is joint tenancy or tenancy in common.

5.17 Agreements to the contrary We indicated at the beginning of this paper that we were not seeking to impose co-ownership on the reluctant but rather to propose a simple rule in an area where the application of property law leads to difficulty and discrimination. It follows that co-ownership should not apply where the spouses have made some other arrangement. We have considered how best this can be expressed. The 1964 Act refers to "an agreement to the contrary". "Agreement" here does not mean a legally binding contract, for such would be rare within marriage. It might be that this should be made clear by a phrase such as "a common intention to the contrary".

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49 In general the courts have made no such distinction - see e.g. Gissing v. Gissing [1971] A.C. 886, Cowcher v. Cowcher [1972] 1 W.L.R. 425 although a more recent decision has done so, Young v. Young (1983) 14 Fam. Law 271.

Whatever phrase is used, it should be made clear that the agreement or the common intention need not be expressed or evidenced in writing. Otherwise, there may be arguments to the effect that the agreement is altering the property rights conferred by this provision and so should comply with any statutory requirements for writing. As a general principle, it is undesirable to require formalities when many people will be unaware of them.

5.18 Retrospective effect As with our earlier discussion we seek views as to whether or not this proposal, if enacted, should have retrospective effect.[50]

5.19 Bank Accounts We have given some thought as to whether any special provision would be necessary to ensure that the position of those who organise their finances through bank accounts is no different from those who make money available to each other in cash. We consider that if a phrase such as "money made available" is used, this should be wide enough to cover arrangements whereby a spouse draws money from a joint bank account for joint purposes, or indeed, where a spouse by arrangement draws money for joint purposes from the other spouse's account. It is important that it is clear that as far as money drawn for joint purposes is concerned, we are intending to reverse the decision of Re Bishop (decd.)[51] that property bought with money drawn from a joint bank account is the property of the purchaser unless there is an agreement to the contrary. Despite the rather different approach of the earlier case of Jones v. Maynard[52] that property bought out of a "common fund" would, in the absence of special factors like an agreement, jointly owned, Re Bishop has been accepted as good law.[53]

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50 See para. 4.17.

51 [1965] 1 Ch. 450.

52 [1951] Ch. 572.

53 Bromley, Family Law 6th ed., (1981), p. 426, Cretney; Principles of Family Law, 4th ed., (1984), pp. 659.

Our proposal would mean that if money were drawn from a joint bank account for joint purposes, that money and any property bought with it whether for joint purposes or not, would be jointly owned, in the absence of agreement to the contrary.

5.20 Impact of our Proposal on Matrimonial Property From time to time in this discussion we have referred to the fact that this proposal will give rise to co-ownership of some propety which is at present separately owned. It is important that the impact on matrimonial property is made clear. First of all, the proposal does not impose any general co-ownership. Co-ownership will only arise in certain defined circumstances, and then only in the absence of an agreement to the contrary. The circumstances in which co-ownership will arise are as follows:-

(i) Money must be made available by one spouse to the other, or both spouses must be making money available for their joint purposes so as to create a "notional pool".

(ii) That money must be for joint purposes. Those purposes may include paying the mortgage instalments on the matrimonial home, or the purchase of household goods.

(iii) That money must be used to acquire the property in question.

(iv) There is no agreement to the contrary.

5.21 Examples of how this will work may be helpful. All the examples given below will give the same result if "wife" is substituted for "husband" and vice versa.

(i) If the matrimonial home is in the husband's sole name, and he pays the mortgage instalments and his wife does not earn, the proposal has no effect.

(ii) If the matrimonial home is in the husband's sole name and he pays the mortgage instalments but he is only able to do so because the wife uses her earnings to buy the food, then the proposal will result in so much of the house as was paid for with the mortgage being co-owned.

(iii) If the matrimonial home is in the husband's sole name, they contributed equally to the deposit and he gives his wife an allowance out of which she pays for all the household expenses including the mortgage instalments, the house will be co-owned.

(iv) If the husband draws money from a joint bank account, into which they both pay their earnings, in order to buy a vacuum cleaner, the vacuum cleaner will be jointly owned. If the money is drawn from the husband's own bank account there is no co-ownership as the money has not been made available to his wife, unless she has income which she is using for other joint purposes.

(v) If he draws money from the same joint bank account to buy himself an overcoat, he will be its sole owner. If he uses the money to buy his wife a coat, that coat belongs to her alone.

(vi) If he draws money from the same joint bank account to do the weekly shopping, finds he has some left over and puts it into another account in his sole name, it will be jointly owned. If the money is drawn from the husband's own bank account, there is no co-ownership as money has not been made available to his wife, unless she is using her income for other joint purposes.

(vii) If the wife draws money for the weekly shopping from a bank account, all the money in which was provided by her husband, and there is a surplus and she puts it into an account in her sole name, the surplus will be jointly owned.

Examples (i) (ii) and (iii) are less likely to occur in practice since the majority of matrimonial homes are jointly owned in any event. Since co-ownership of the matrimonial home is so common, it seems likely that where the matrimonial home is in the sole name of one spouse, the courts may more easily be able to find evidence of an agreement to exclude these provisions.

5.22 Effect on third parties Where the property is jointly owned as a result of this proposal and that property is then sold by one spouse acting alone, the effect on the purchaser must be considered. Where the property in question is land, the interest that a spouse acquires as a result of this proposal will be equitable only and purchasers will be affected to the same extent as they are now when a person has an equitable interest in land.[54] Thus we would not expect any difficulties to arise from this proposal that do not already arise when one person has an equitable interest in land which, at law, is held by another. Where chattels are concerned we have provisionally recommended that they should be co-owned in law, not just in equity. The effect of this recommendation would be that, unless he could establish agency or estoppel, a purchaser from one co-owner would not obtain title to the chattel.[55] We have considered whether this is likely to cause practical problems. We think firstly that in practice such sales are unlikely to be common and where they do occur agency or estoppel may give title to the purchaser. Secondly if problems do arise these are not new problems but ones which already exist wherever chattels are jointly owned, as must be very common now.

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54 For a general account see R.E. Megarry and H.W.R. Wade, The Law of Real Property 5th ed., (1984), pp. 136-140 and pp. 204-219.

55 Sale of Goods Act 1979, s.21.

5.23 Purchase by instalments When goods are purchased under a hire purchase agreement or a conditional sale agreement title does not pass to the purchaser of the goods until all payments under the contract have been made. At this point, under this proposal, such goods might become legally jointly owned. Before that point neither the purchaser nor his spouse has title to the goods and therefore this proposal should not affect the right to repossess. However some goods are bought under credit-sale agreements where title to the goods does pass at the beginning of the contract. Here no questions of repossession can arise[56] and we therefore do not think it will cause problems if this proposal gives rise to joint ownership of such goods.

5.24 Summary of Proposals It is suggested that the 1964 Act be replaced by a provision to the effect that where money is made available directly or indirectly by one spouse, for the joint purposes of the spouses (including payment of instalments towards the purchase of any property), that money, and any property acquired with it, shall in the absence of any agreement to the contrary, written or otherwise, be owned equally by the spouses.

HOUSEHOLD GOODS

6.1 It is likely that one major effect of the proposal outlined above would be to make many more household goods jointly owned. We do not consider this paper the appropriate place to discuss wider proposals on household goods but we would welcome preliminary views as to whether a presumption of co-ownership of household goods similar to that in Clause 25 of the Family Law (Scotland) Bill[57] would be helpful. The

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56 A provision that the goods could be repossessed would render the agreement void as an unregistered bill of sale.

57 Set out at Appendix C.

area is a complex one and we have read with interest the discussion of the issue in the Consultative Memorandum and the Report of the Scottish Law Commission.[58] It might be said that if the major impact of this proposal is to create more co-ownership of household goods a presumption of co-ownership would render this proposal unnecessary. However co-ownership of household goods is only one aspect of this proposal, which also relates to co-ownership of savings and the matrimonial home. More importantly the aim of this proposal is not primarily to create more co-ownership. It is to clarify a very confused and unsatisfactory area of the law.

MONEY MADE AVAILABLE BY ONE SPOUSE FOR THE PURPOSE OF THE OTHER

7.1 The proposal discussed above is confined to the situation where money is made available for joint purposes. As we stated earlier, the existing law where it is made available for sole purposes is equally discriminatory and confusing. There seem to us to be two possible ways of improving it.

(i) It would be possible to enact a rule parallel to the one above but stating that where money is made available by one spouse to the other for the purposes of the other, that money and property acquired with it should be owned by the other spouse subject to agreement to the contrary.

(ii) If it is thought desirable to alter the present law as little as possible, its discriminatory nature could be corrected by making the presumption of advancement apply equally to both spouses. In other words, disputes as to such

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58 (1983) Consultative Memorandum No. 57 and Scot. Law Com. No. 86.

transfers would be decided firstly by reference to the evidence as to what the transferring spouse intended, but in the absence of such evidence a gift would be presumed.

Of course, the law could be made non-discriminatory by making the presumption of resulting trust apply equally to both spouses. However we consider that the law should adopt a presumption which is likely to reflect what the majority of spouses intend in the majority of cases. We would suggest that generally speaking when a spouse makes money available for the use of the other spouse, a gift is intended.

7.2 On balance, our provisional view is that the second solution is preferable. While the law in this area is unsatisfactory, to lay down a rule would impose an outright gift where the giver did not intend one. Establishing an agreement to the contrary might be putting too high a burden on the spouse who made the money available. Therefore a presumption of gift which will give way to evidence of the transferring spouse's intention would be sufficient. While this paper is concerned with transfers of money, there is no reason why this proposal should not apply to any property transferred from one spouse to another. We welcome views as to the preferred approach and, indeed, whether any reform in this area is necessary.

SUMMARY

8.1 We end with a summary of our provisional conclusions and recommendations on which we invite comments and criticism. We would particularly welcome views as to whether any reform of this area of law is necessary as well as views on the merits or defects of our proposals.

(a) The existing law as to the effect of transfer of money between spouses is discriminatory and unclear.

(b) The Married Women's Property Act 1964 should be amended so that it applies equally to husband and wife.

(c) Further reform should be considered so that the effect of a transfer of money depends not on who makes it but on whether it is for joint purposes or for the sole purposes of the other spouse.

(d) Money made available by one spouse to the other for joint purposes and property acquired with that money should be owned by them both.

(e) Where both spouses make money available for joint purposes in such a way as to create a "notional pool" of their resources then that money and any property acquired with it should be owned by them both.

(f) Whether that money and property acquired with it should be held by the spouses as joint tenants or as tenants in common is a question on which we have reached no conclusion.

(g) These proposals should have no effect if the spouses have made their own agreement as to the ownership of such money or the property acquired with it. No formalities should be required for such an agreement.

(h) Money made available by one spouse for the sole purposes of the other should be presumed to belong to that other unless there is evidence that a gift was not intended.

APPENDIX A

MARRIED WOMEN'S PROPERTY ACT 1964

1964 CHAPTER 19

An Act to amend the law relating to rights of property as between husband and wife. [25th March 1964]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Money and property derived from housekeeping allowance.

1. If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to the husband and the wife in equal shares.

Short title and extent.

2.-(1) This Act may be cited as the Married Women's Property Act 1964.

(2) This Act does not extend to Northern Ireland.

APPENDIX B

A

BILL

INTITULED

An Act to give to a wife half of what she saves on housekeeping. A.D. 1963

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

1. If a wife makes savings out of what her husband gives her for housekeeping, half of any money so saved shall belong to her absolutely. Housekeeping savings.

2. This Act may be cited as the Married Women's Savings Act 1963. Citation.

APPENDIX C

FAMILY LAW (SCOTLAND) BILL 1984

Presumption of equal shares in household goods.

25. - (1) If any question arises (whether during or after a marriage) as to the respective rights of ownership of the parties to a marriage in any household goods, it shall be presumed, unless the contrary is proved, that each has a right to an equal share in the goods in question.

(2) For the purposes of subsection (1) above, the contrary shall not be treated as proved by reason only that while the parties were married and living together the goods in question were purchased from a third party alone or by both in unequal shares.

(3) In this section "household goods" means any goods (including decorative or ornamental goods) kept or used at any time during the marriage in any matrimonial home for the joint domestic purposes of the parties to the marriage, other than -

(a) money or securities;

(b) any motor car, caravan or other road vehicle;

(c) any domestic animal.

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