LEGISLATIVE COMMENT

S. 161 MARRIAGE ACT 1958 (VIC.)

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In the late nineteenth century, all the Australian States adopted legislation[1] similar to the English *Married Women's Property Acts*[2] which had enabled married women to own and dispose of property in the same manner as a *feme sole*. It was long hoped that the legislation conferred on State Supreme Courts and Magistrates' Courts discretionary powers enabling those courts to do justice between the parties to a marriage in a property dispute. However, these hopes were frustrated by the High Court of Australia in 1956 in *Wirth* v. *Wirth*[3] when it was held that the Married Women's Property legislation only allowed the court to determine rights of married couples in accordance with established principles of property rights. Property would be regarded as belonging to the party entitled to it under the general law of property and not in accordance with any notion of fairness. This remains the position under State law today except in Victoria.

In 1962 s. 161 of the *Marriage Act* 1958 (Vic.) was altered so as to confer on a Victorian Supreme Court judge a power to make "such order with respect to property in dispute as he thinks fit".[4] This discretion is subject to some defined restrictions[5] but it has been held that it is a real power to dispense justice.[6]

Despite the incursions made into State property jurisdiction by the *Family Law Act* 1975 (Cth.), important areas of State jurisdiction in property proceedings involving parties to a marriage remain. State jurisdiction is involved whenever a dispute arises between parties who do not seek principal relief in respect of their marriage for example, where they are still living together, or where they are separated without intending to dissolve the marriage. Moreover, contests with respect to matrimonial

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1 *Married Persons (Property and Torts) Act* 1901-1964 (N.S.W.). *Married Women's Property Acts* 1890-1952 (Qld.). *Married Women's Property Act* 1892 (W.A.). *Married Women's Property Act* 1935 (Tas.). For the A.C.T. see *Married Women's Property Act* 1901 (N.S.W.) as amended by *Married Women's Property Ordinance* 1968.

2 S. 17 *Married Women's Property Act* 1882 (Eng.).

3 (1956) 98 C.L.R. 228.

4 S. 161(3).

5 E.g. he may not defeat any common intention expressed by the parties nor may he take into account conduct other than "economic" conduct (s. 161(4)(a)). In addition there is a presumption of joint tenancy in the matrimonial home, s. 161(4)(b).

6 *Hogben* v. *Hogben* [1964] V.R. 468. *Moore* v. *Moore* [1965] V.R. 61. *Boykett* v. *Boykett* [1965] V.R. 422. *Gallo* v. *Gallo* [1967] V.R. 190.

property are not confined to parties to a marriage. State jurisdiction is also relevant when a creditor or trustee in bankruptcy seeks to argue that a particular asset belongs to a debtor or bankrupt and not to his spouse. Or there might be a testamentary dispute.

The discretion conferred by s. 161 on the Supreme Court has been seen as overcoming many of the problems associated with discerning nice matters of intention and contribution with which the other Australian States are beset in ascertaining ownership of assets by strict legal enquiry. Section 161 also avoids some of the gross injustices perpetrated under strict separation of property concepts where a wife is unable economically, by virtue of her role within the marriage, to acquire separate assets. A wife who contributes indirectly by defraying household expenses thereby liberating her husband's money for acquiring assets may also benefit by the discretion conferred by s. 161 whereas this contribution gives her no property rights in other States.[7]

Accordingly, it would be a retrograde step, given the accepted generosity of spirit with which s. 161 has been customarily applied by the courts[8] to restrict the operation of that section in any way. However, it seems that in *Pate* v. *Pate*[9] Lush J. expressed a somewhat restrictive view of the scope of the power of the Supreme Court judge in s. 161(3) to make (subject to the limitations in s. 161(4)[10]) "such an order with respect to . . . property in dispute . . . as he thinks fit".

It would appear that a section of the Victorian legal profession has accepted the restriction of Lush J. on the scope of the s. 161(3) order.[11] It is this writer's view that his Honour's interpretation of s. 161(3) is damaging to the wide powers sought to be achieved by that subsection and is contrary to principle and to precedent.

Pate v. *Pate* concerned a farm property that had been bought in the husband's name in 1935, although the wife had contributed towards the purchase of the property by payments into the husband's bank account. She also worked arduously on the farm throughout the marriage.

In February 1967 the husband entered into a contract to sell the land. The wife applied to the Supreme Court under s. 161(3) to protect her interest in the property.

In May 1967 Gillard J.[12] found that the wife had provided one-third of the value of the farm and accordingly his Honour declared that the husband held the land on trust for himself and his wife in the proportions of 2 to 1 shares, corresponding with their respective contributions. He did so on the basis that he found that the property was not a matrimonial home, and that the husband was the legal and beneficial owner in that there was no

[7] *Robinson* v. *Robinson* [1961] W.A.R. 56.
[8] See supra fn. 6.
[9] [1968] V.R. 404.
[10] See supra fn. 5.
[11] E.g. in lectures given at the Leo Cussen Institute for Continuing Legal Education entitled "Family Property and Third Party Rights" on 28 February 1980 by Messrs J. Kay and B. Benjamin.
[12] *Pate* v. *Pate (No. 2)* [1970] V.R. 97.

evidence adduced by the husband that any purchaser had rights to the land under a contract of sale.[13]

In June the husband completed the sale of the property, at a price which the wife claimed was under its true value. She then claimed damages for breach of trust in the action heard by Lush J. who rejected her claim on the grounds that "s. 161(3) confers a jurisdiction . . . to make orders with a prospective operation only". He said,[14] "In my opinion a trust declared under s. 161(3) comes into existence on the day when the order is made". Therefore, treating the sale as having been entered into in February, Lush J. held that it predated the declaration by Gillard J. which in turn could not have any retrospective effect so as to encumber the sale transaction with the trust in favour of the wife. His Honour felt that the order made by Gillard J. was not a declaration of a resulting trust but simply a "discretionary order" under s. 161(3). Indeed, he felt that Gillard J. could not have declared an existing resulting trust because of the inconclusive nature of the evidence as to the proportion of the moneys that the wife had contributed.[15] Furthermore, it was conceptually unwieldy to suggest a trust stretching back indefinitely or to an indeterminable point of time.

The following observations may be made of Mr Justice Lush's construction of the nature of the declaration made by Gillard J. Whatever one might feel about the true nature of the order made by a court under s. 161(3), the words of Gillard J. are in the clear language of a declaration of a resulting trust in the property arising out of the wife's contribution towards the purchase and increase in value of the property.[16] This he found as a fact to be one-third of the total value, the view of Lush J. of the evidence notwithstanding, even assuming (which one need not) that Lush J. was in a position to assess the evidence in the prior proceedings. As to his Honour's difficulties in fixing a point of time at which the trust may be said to have commenced, without diminishing the magnitude of this problem it suffices to say that Gillard J. had described it as having existed for a "very long time".[17] Certainly it would have existed by February 1967 when the sale had been undertaken by the husband as, by then, the extent of the wife's contribution towards the total value had become fixed and certain.

Lush J. based his view "on the Act itself and on authority".[18] It is difficult to read s. 161(3) as contemplating that orders made under the subsection should only operate prospectively. Indeed to read it in the context of the rest of s. 161(3) quite the contrary construction would seem appropriate. Section 161(4)(a) looks back to past intentions expressed by the parties and s. 161(4)(b) creates a presumption that the parties "hold or . . . have held" the matrimonial home as joint tenants. Section 161(3) is expressed to be subject to s. 161(4). Moreover, s. 161(5)(a) empowers the judge to set aside any transaction which was designed to defeat an

13 [1970] V.R. 97, 101, 102.
14 [1968] V.R. 404, 406.
15 Ibid. 405.
16 [1970] V.R. 97, 103.
17 Ibid.
18 [1968] V.R. 404, 406.

anticipated order with respect to a property that is the subject of proceedings under s. 161. It is submitted that these provisions clearly contemplate that rights may arise antecedently to the making of an order. This legislative scheme does not appear to be constructed around a jurisdiction to make orders which only create rights *in futuro*.

To the extent that Mr Justice Lush's reading of s. 161(3) is predicated on "authority" his conclusions are somewhat surprising. His Honour quotes Herring C.J. in *Hogben* v. *Hogben*[19] where he said that the judge may, under s. 161(3) "think it just merely to declare where the title presently resides. . . . He may declare where the title shall thenceforth reside. . . . He may direct a disposition of the property". Again, with respect to Lush J., it would seem that Herring C.J. contemplated that an order with prospective operation was only one of the options available to a judge under s. 161(3). Moreover, other cases have gone to pains to retain and stress the breadth of the judicial discretion conferred by that subsection.[20] Accordingly, it is this writer's view that Lush J. was constrained neither by the language of s. 161 nor by authority to restrict s. 161(3) to orders with prospective operation.

Be that as it may, there is an even more surprising feature of *Pate* v. *Pate*. Lush J. acknowledges that his brother judge had in the previous proceedings treated the property as belonging to the husband and not being subject to any sale. Yet Lush J. proceeds to treat the property as being sold by that date (i.e. May 1967) thereby ignoring the entire basis on which Gillard J. had declared the trust. The lack of comity is unusual.

It is this writer's view that *Pate* v. *Pate* should not lead to a restrictive reading of s. 161(3). Certainly any suggestion that the reasoning in *Pate* v. *Pate* would apply to s. 161(4)(b) so as to prevent a party whose name was not on the legal title to a matrimonial home from protecting that half-interest by lodging a caveat is alarming.[21] Whatever weight the judgment of Lush J. may have in respect of s. 161(3) there was no attempt in the judgment to designate the joint tenancy created by s. 161(4)(b) as an adjudicatory right and this conclusion, it is submitted, should strongly be resisted.

What then is the scope of an order made under s. 161(3)? It is suggested that many such orders will in fact be prospective in operation. On the other hand, others may be declaratory of existing rights, while yet others may seek to alter interests in property with retrospective operation being given to the order if the judge so determines. The effect that any given order will have must depend entirely on the construction of that order to ascertain what the judge seeks to do in the exercise of his wide discretion under s. 161(3). The cases which have emphasized the wide powers conferred

[19] [1964] V.R. 464, 471.
[20] See supra fn. 6.
[21] See supra fn. 11. It would seem that some Victorian legal practitioners are advising the untitled spouse that no caveat may be lodged in respect of the unregistered half-share until a court has declared its existence. It is submitted that the language of s. 161(4)(b) is clearly against the suggestion that the joint interest is only an adjudicatory right.

by that subsection should not henceforth be read as restricted by the single judgment in *Pate* v. *Pate*.[22]

Gillard J. was clearly endeavouring to protect the rights of the unfortunate Mrs Pate. It is hard to believe that s. 161(3) was not drafted with people exactly like her in mind. And that is how one ought to read it.

[22] N.B. that this case has been approved in dicta by Menhennit J. in *Denniston* v. *Denniston* [1970] V.R. 535, 540, 541.