MATRIMONIAL PROPERTY LAW REFORM IN AUSTRALIA: THE 'HOME AND CHATTELS' EXPEDIENT. STUDIES IN THE ART OF COMPROMISE

by

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The law concerning family assets is, in common law jurisdictions, felt to be so confused and unsatisfactory that most of them have responded with elaborate schemes for determining the property rights of members of the family. Accordingly, in the last decade the separate property régimes which operated in Quebec, Ontario, Saskatchewan, New Zealand and in the United Kingdom (from whence they came) have all undergone extensive review, and reforms have been implemented or foreshadowed. These reforms vary in their extent and in the range of family assets to which they relate but they do have one feature in common. The uniform feature of these various schemes is that they have isolated the matrimonial home and the family's household chattels for special legislative treatment with a view to ensuring that their disposition within the family promotes their optimum usage and justice between the parties.

This approach must be seen as a response to the uncertainty and unfairness associated with the present law. This law has grown up in a haphazard and piecemeal fashion so that while in some cases the special position of the home is recognised;[1] in others, the home has been treated like any other piece of property; thus, judges sometimes take care to deny that the law recognises its matrimonial character at all.[2]

The present law fails to provide adequate answers to very basic questions: when can a wife claim a beneficial interest in the house which stands in the husband's name? Is the juristic basis for determining beneficial interests in the home a matter of agreement? If not solely, or not at all, then what other basis is there? How should the courts calculate the size of spouses' beneficial interests? These are questions which arise daily and such disputes, far from being uncommon and esoteric, are part of the daily lives of married people as well as of third parties, such as creditors and legatees who come into contact with the family.

The situation in Victoria, under State law, where no principal relief proceedings in respect of the marriage are relevant was somewhat improved in 1962 with the enactment of a new s. 161 of the *Marriage Act* 1958. While this legislation does nothing to alleviate the difficulties of

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1 E.g. as in the *Matrimonial Homes Act* 1967.

2 E.g. Viscount Dilhorne in *Gissing* v. *Gissing* [1970] 2 All E.R. 780, at p. 785.

tracing contributions and intentions associated with household chattels and other family property it removes these, in large part if not entirely, in questions of rights to the matrimonial home. The Victorian legislation creates a presumption of joint tenancy at least where certain circumstances exist.[3] However, it is only a presumption and is rebutted by proof that the parties intended some other form ownership, so that enquiries into the parties' intentions and contributions are by no means barred in Victoria. The other Australian States apply the separate property régime in its full rigours to home and chattels and other family assets alike, to the utter chagrin and abandonment of the wife who devotes her life to making the home and thereby acquiring title to nothing. Even the working wife, who contributes what she can financially to the marriage, may find that she has acquired few tangible assets if she has contributed to the general running expenses of the home rather than keeping a strict accounting of all acquisitions and ensuring that her moneys are earmarked and applied towards the purchase of defined items.[4]

Under Federal law,[5] which applies if principal relief in respect of the marriage is sought, the Family Court has wide discretionary powers to adjust spouse's interests and freely allot the matrimonial assets between the parties.[6] In federal jurisdiction the ascertainment of the spouses' strict proprietary rights under the general law has become largely unnecessary. However, the discretionary jurisdiction is exercisable only in association with principal relief proceedings. Moreover, interests in family property are not defined as an incident of marriage itself, but are dependent on a discretionary award for which a party must pray the indulgence of the court.

No systematic reform of matrimonial property has been undertaken in Australia. Our attentions have been taken up with the broader canvas of family law reform which has resulted in the *Family Law Act* 1975. Some of the details in the picture must now be filled in. The unanimity with which other systems have produced measures relating to the home and household goods compels us to consider these schemes to see whether they might offer a greater measure of fairness and certainty within Australian family property law.

A COMPARISON OF LEGISLATIVE PROVISIONS

The models which we shall examine here proceed on the principle that the home should be owned equally by the parties irrespective of how it was financed and who is designated as the owner of the home

3 *Marriage Act* 1958, s. 161 (4) (b).
4 *Robinson* v. *Robinson* [1961] W.A.R. 56.
5 *Family Law Act* 1975.
6 Magistrates' Courts also exercise federal jurisdiction in respect of property which under s. 46 can be avoided in respect of property exceeding $1000 in value by a party choosing to remove a matter to the Family Court. Magistrates' Courts are not specifically considered here, but are understood as being included in the relevant circumstances, as are State Family Courts under s. 41.

according to its legal title. They also insist that some special protection be given by the law to the household chattels, if not by allocating their ownership then by securing their use and enjoyment in the optimum way; again contribution and title — the obsessional concerns of separate property régimes — are irrelevant in the scheme of these new laws.

We shall briefly examine the legislation proposed or implemented in other common law jurisdictions.

1. The United Kingdom

The U.K. Law Reform Commission's proposal[7] is that in the absence of a contrary agreement, all matrimonial homes should be jointly owned on a matrimonial home trust. Where one spouse alone holds the legal title, then the other should be entitled to protect his beneficial interest by registration and should also be able to apply to the court for an order vesting legal title in their joint names. A sole vendor of a home could be required to make declarations to the purchaser as to whether or not the property was subject to a matrimonial home trust. On the death of one of the parties a right of survivorship would accrue to the other. The Commission has also drafted extensive provisions dealing with the incidental effects of statutory co-ownership.[8] The U.K. proposal also contains a plan for allocating household goods in the event of conflict within the family. This plan does not involve any alteration in the ownership of these chattels but only their use and enjoyment. We shall consider it later.

2. Ontario

The Ontario Law Reform Commission has embarked on a very comprehensive reform programme of that Province's matrimonial property laws.[9] There it was proposed to introduce a new matrimonial régime modelled on the Scandinavian 'deferred participation' scheme. In this system, the spouses maintain separate property during the currency of the marriage, but are entitled to an equal sharing of their combined assets acquired during the marriage on its termination. The scheme would, in itself, be effective to deal with the disposition of the home and chattels, but it was felt that special provisions were required here, and that these reforms should be proceeded with regardless of the action taken with respect to the proposed matrimonial property régime. Moreover, the home and chattels provisions would operate no matter what other property régime was chosen by the parties, so that even separate property régime couples would *prima facie* be subject to them. How-

7 Law Com. No. 86. Third Report on Family Property: The Matrimonial Home (Co-Ownership and Occupation Rights) and Household Goods. (Referred to as Law Com. No. 86, Third Report.)

8 E g. proposals for the position of mortgagees and other third parties, bankruptcy of a party, insurance obligations, the effects of minority and mental capacity of a party are all considered.

9 Ontario Law Reform Commission Report on Family Law, Part IV Family Property Law 1974-1975. (Referred to as the Ontario Report.)

ever, the Ontario legislature rejected this approach in the *Family Law Reform Act* 1978. The legislation created a deferred community which was confined to 'family assets' which were defined in s. 3 (b) to comprehend, essentially, the home as well as any property owned by a spouse and used by the family. This concept goes further than the home and chattels (e.g. it would include a holiday home) but is considerably narrower than the comprehensive deferred community recommended by the Commission. Family assets are equally divided under s. 4 (1) regardless of legal title. A spouse may claim a share in assets other than family assets only on proof of contribution to those assets under s. 8 of the Act. Part III establishes joint rights including occupation rights in the home and sets out requirements for transactions with respect to the home to be joint. This legislation is given retrospective effect under s. 49. However, the parties may contract out of this statutory sharing scheme by 'domestic contract' under Part IV of the Act.

3. Saskatchewan

The Saskatchewan Law Reform Commission almost went the way of its sister body in Ontario, having originally proposed a deferred participation scheme as a new matrimonial property régime. Super-imposed upon this, as in Ontario, there was to be legislation specifically dealing with the home and its contents.[10] In the result, however, the Saskatchewan Law Reform Commission resiled from the deferred participation scheme for a number of reasons.[11] The reluctance of the Commissioners to embrace deferred participation as a régime was not, however, mirrored in their attitudes to projected home and chattels legislation, and, ultimately, a scheme was agreed upon which, in large part, emulates the U.K. and Ontario proposed models in this regard.

4. New Zealand

In New Zealand, the *Matrimonial Property Act* 1976 provides for a new matrimonial property régime which distinguishes between *matrimonial property* which is shared and *separate property* which is not. The home and family chattels are classified as matrimonial property and, with certain exceptions, are divided equally.[12] They are treated separately from other heads of matrimonial property in that in the normal course the home and family chattels are shared equally whereas other matrimonial property may be divided unequally, on proof of a clearly greater contribution to the marriage as a whole, by one spouse.[13] Happily, the court is not generally involved in assessing the parties respective

10 Law Reform Commission of Saskatchewan: 'Division of Matrimonial Property: Tentative Proposals for Reform of Matrimonial Property Law.' Third Working Paper 1974.

11 Law Reform Commission of Saskatchewan: Report to the Attorney-General May 1976, 'Proposals for a Saskatchewan Matrimonial Homes Act' pp. 47-48. (Referred to as the Report to the Attorney-General.)

12 *Matrimonial Property Act* 1976, ss. 8, 11.

13 Ss. 15, 18.

contributions to the marriage, in determining rights to the home and chattels. It has proved difficult enough to assess their contributions to a particular asset in a separate property régime let alone contributions to their marriage! The New Zealand legislation accordingly aims at giving parties equal shares in the home and chattels and it proceeds to do this by adopting a presumption of equal sharing with respect to these which is somewhat stronger than the presumption which applies to other matrimonial property. The special position of the home and chattels has thus been preserved notwithstanding the general application of sharing principles to other categories of property. It has been found, as a matter of experience, under the Act that 'the equal sharing of domestic property has proved in practice to be the rigid formula that the legislature intended'.[14]

5. *Post Scriptum* on Victoria, Australia

To the list of jurisdictions where the home and chattels are treated separately, we can add Victoria. We have noted that a presumption of joint ownership has applied with respect to the matrimonial home for some 18 years in Victoria, so that this law can hardly be considered as a novel reform.

The Victorian 'presumption' approach is closer to the New Zealand model than to the U.K. scheme although the factors rebutting the presumptions in Victoria and New Zealand are somewhat different.

Thus, in New Zealand, equal ownership will not apply in the event that the marriage is of short duration within s. 13, or where there are extraordinary circumstances rendering equal sharing repugnant to justice within s. 14. In those events, the parties' shares in the home and chattels are determined in accordance with their respective contributions to the marriage partnership.

In Victoria, on the other hand, the presumption of joint ownership under s. 161 of the *Marriage Act* 1958 is rebutted by 'sufficient evidence of intention to the contrary' or 'special circumstances which appear to the Judge to render it unjust'.[15]

In the U.K., Saskatchewan and Ontario schemes co-ownership is achieved by operation of law; although for practical purposes the result may not differ greatly in the various jurisdictions we are considering. In fact, the U.K. Law Commission actually considered the possibility of proceeding by a presumption of equality. They rejected it, however, on the grounds that difficulties were presented by having to determine the circumstances in which the presumption should be rebutted, and that this device would not be conducive to certainty in the operation of the law.[16]

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14 R. L. Fisher, 'Are Husbands Getting a Fair Share?' [1978] *N.Z.L.J.* 375. (Referred to as R. L. Fisher.)
15 S. 161 (4) (b).
16 Law Com., Working Paper No. 42 1971 on Family Property Law par. 0.27.

The mechanism for bring about the sharing of the home is not the only point of difference in the schemes we are considering. Indeed, the points of difference are as numerous as their similarities. Thus, there are dissimilarities even on the question of what should be treated as the 'matrimonial home' for the purposes of sharing. The Victorian legislation is confined to the 'dwelling and its curtilage which is wholly or principally occupied as the parties' matrimonial home'.[17] A similar concept is employed in the Ontario Oct.[18] However, the New Zealand legislation is not restricted to a house which is used either exclusively or permanently as a family residence. Similarly, it is contemplated in the U.K. proposal that property which does not form part of the immediate home either because it is used for some non-residential purpose or because it is not in the occupation of the spouses should, nonetheless, be included, in some circumstances in the statutory co-ownership if it goes with the home as an adjunct to it.[19] Thus a mixed home and business could be subject to the scheme in the U.K. The same would occur under the Saskatchewan proposal.[20]

Similarly, whereas the Victorian legislation would only affect a house bought in contemplation of use as a matrimonial home, in New Zealand,[21] Ontario,[22] U.K.,[23] and Saskatchewan[24] co-ownership would extend to any residence used as the home, even if it were acquired by one of the parties before any marriage was contemplated.

The type of holding acquired by the spouses also changes from jurisdiction to jurisdiction. In Victoria [25] and the U.K.[26] a joint tenancy results whereas in Saskatchewan a tenancy in common is preferred.[27] The Ontario Act and the New Zealand Act, on the other hand, leave the interest in the home as a nameless entity as it is absorbed into the wider scheme for division of family property.

In addition, there are various approaches to homes which are given by way of gift or inheritance to one party only. In Victoria the intention of the donor is respected (*i.e.* the house is not shared, as an exception to the presumption of joint tenancy). The same would apply in the U.K., unless the donor expressly directs to the contrary in the instrument of gift.[28] In Ontario, the court has a discretion to depart from equal division in the event that the property was acquired by inheritance or gift.[29] In Saskatchewan, on the other hand, co-ownership is to apply

17 S. 161 (4) (b).
18 *Family Law Reform Act* 1978, s. 39.
19 Law Com. No. 86. Third Report Book I par. 1.39.
20 Report to the Attorney-General, at pp. 23-24.
21 *Matrimonial Property Act* 1976, s. 8 (a).
22 Ontario Report, at p. 135.
23 Law Com. No. 86. Third Report Book I paras. 1.106 to 1.110.
24 Report to the Attorney-General, at p. 50.
25 S. 161 (4) (b).
26 Law Com. No. 86. Third Report Book I par. 1.52.
27 Report to the Attorney-General, at pp. 28-29.
28 Law Com. No. 86. Third Report Book I paras 1.116 to 1.126.
29 *Family Law Reform Act* 1978, 54 (4) (c).

even where the house was a gift or legacy to a spouse.[30] In New Zealand, the separate property potential of such a home is overridden by the 'matrimonial' characteristic and that home would also be subject to the sharing rules.[31]

One might question, at this point, the merits of sharing the home which was intended as a gift for one of the parties. This law is counter-productive as it will inhibit the making of such gifts. The fond parent who is unwilling to benefit a daughter-in-law or a son-in-law is well advised to sell his home and make a gift of the proceeds to his child. Were his intention as a donor to be respected, on the other hand, then the donee's spouse would at least acquire the advantage of living in the house while it is mutually regarded by the parties as their matrimonial home. The New Zealand, Saskatchewan, and, to some extent, the U.K. provisions, in their concern for fair treatment of both spouses, ultimately injures them both by inhibiting gifts of property which might be used as a matrimonial home. The decision to override the donor's intention will only lead to unwillingness on the donor's part to release such real estate at all.

The schemes we are considering also differ greatly in other significant aspects (*e.g.* the extent to which they are to apply retroactively to homes acquired before the new legislation, the number of properties which may be regarded as a matrimonial home at any one time, the effects of a sale by one spouse without the other's consent, the range of protections given to third parties, such as, mortgagees, *vis-a-vis* the spouses — these are all subject to important differences of approach). There is also a fundamental difference in the approach adopted towards household goods in New Zealand on the one hand and the British and Canadian models on the other and we shall need to look at this subject separately. But for the moment, we are examining the characteristic which is common to these schemes — that is the separate and special treatment of the home and/or house-hold chattels.

The questions which now arise are —

i. why were these items singled out for special treatment; and
ii. to what extent we should be anxious to augment the Victorian s. 161 into a general home and chattels scheme for Australia. In short, do we want this as a feature of any proposed matrimonial property system we may introduce into Australia.

B. *SPECIAL TREATMENT OF THE HOME AND CHATTELS: WHY WAS THIS DONE?*

In Ontario, although a total overhaul of the separate property régime is being undertaken it was nevertheless felt that, 'the matrimonial home must be made the subject of separate treatment corresponding to its special significance as a major asset, a basic family shelter, and a focal

30 Report to the Attorney-General, at p. 21.
31 *Matrimonial Property Act* 1976, s. 103 (3).

point for family activity', and, 'as such, required occupational rights in it to be secured'. Moreover, 'in many marriages it is the major asset and therefore requires special treatment of proprietary rights with respect to it'.[32]

The Ontario Commission approach to special treatment and to a lesser extent, the Ontario Act, along with that in the New Zealand *Matrimonial Property Act* 1976, co-existing as they do with global matrimonial property reforms, must be regarded as a greater ideological commitment to that principle than that of the Victorian Act, which might appear to be an attempt at minimum perturbation of the existing separate property system as a whole by shoring up the law in relation to one major contentious asset. In Saskatchewan, too, the home and chattels scheme represents something of a compromise between resolving all matters by the exercise of judicial discretion, as is presently done, which leaves the law uncertain, and the idea of a total deferred community scheme which would define rights in advance. The Saskatchewan Law Reform Commission was tempted by deferred community for a time, but subsequently resisted it for the moment, as somewhat risky.[33] The U.K. Commission also investigated the concept of deferred community and decided that for a number of reasons it should not be adopted in Britain.[34] While it is conceded that the novelty of the concept is daunting, one might be forgiven for feeling that their concentration on the very much smaller slice of matrimonial property represented by the home and chattels reflects a fear of departing too drastically from the current system, albeit a system which was agreed to be seriously deficient. However, another reason for rejecting deferred community was that the equalization of gains was postponed until the marriage was over. Hence, it perpetuated many of the ills of the separate property régime during the currency of the marriage.[35] To that extent, the statutory co-ownership proposal represents a commitment by the Commission to the principle of sharing major matrimonial assets throughout the marriage on a partnership basis.

To this end, one wonders why the U.K. Law Commission omitted to consider some dramatic reforms in the last ten years to traditional community systems in North America whereby there is joint ownership and joint management throughout the marriage of a wide range of family assets, which would be more extensive than the home and household chattels. Yet, the concept of a traditional community system was not seriously considered at all by the U.K. Commission, presumably because traditional (as compare to deferred) community systems presented as too 'foreign' to the British separate property climate. Yet, in North American jurisdictions, a liberalised traditional community with co-management by both parties of all common property is regarded by

32 Ontario Report, at p. 53.
33 See n. 11 *ante*.
34 Law Com. No. 52, 'First Report on Family Property: A New Approach', paras. 46 to 56.
35 Law Com. Working Paper No. 42, par. 5.78.

many writers as the best of all possible worlds.[36] This major omission in the Commission's deliberations must be regarded as a substantial defect in the work of that body.

The U.K. Law Commission gave a number of reasons for introducing statutory co-ownership. First, a survey had been ordered by the Commission to ascertain how married people manage their property and affairs.[37] The statistics indicated that 91% of husbands and 94% of wives taking part in the survey agreed in principle with the concept that the home should be jointly owned, irrespective of who paid for it. Moreover, there was a *de facto* trend towards joint ownership of the matrimonial home and even homes which were owned by one party were usually regarded by the couple as belonging to both of them (87% of both husbands and wives in this latter category).

Accordingly, it was felt that public opinion in England would be receptive to a statutory co-ownership scheme, given the considerable benefits which were regarded as flowing from that position (*i.e.* '[I]t would in the absence of agreement to the contrary apply universally; it would acknowledge the partnership element in marriage by providing that the ownership of the principal family asset should be shared by the spouses; it would provide a large measure of security and certainty for a spouse in case of breakdown of marriage or on the death of the other spouse; and it would help avoid protracted disputes and litigation').[38]

Thus, the Commission felt that despite the occasional case where unfairness might result to a party, on balance co-ownership was necessary to overcome the unfairness of the present law, that it would operate fairly in the great majority of cases, that it was acceptable to husbands and wives, and that it would achieve justice between them. The conclusion to be drawn from the survey on the attitudinal question was that it was, 'clear that the general public considers that the matrimonial home should not be dealt with simply as any other piece of property but that its matrimonial character should be recognised'.[39] From this, is followed that the home should be the subject of special legislation and that it should be shared by the parties.

Moreover, as a practical matter, the home was isolated by the U.K. Commission due to the dominance of the home in the family's assets, a feature which was confirmed by the social survey. Thus, the majority of home-owners sharing the home would, in effect, be sharing the most substantial asset of the family.

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36 E g. by R. W. Bartke, 'Community Property Law Reform in the United States and in Canada — A Comparison and Critique' (1976) 50 *Tul. L. Rev.* 215. Also Quijano, 'Matrimonial Property Law Reform in Canada: From Separate Property to Community Property with Joint Management' (1975), 13 *Osg. H.L.J.* 381.

37 By J. E. Todd and L. M. Jones, Office of Population Censors and Survey, Social Survey Division, 'Matrimonial Property' 1972 H.M.S.O. 5NN11/700129/5.

38 Law Com. Working Paper No. 42, par. 0.28.

39 D. A. Nevitt and J. Levin, 'Social Policy and the Matrimonial Home' (1973) 36 *M.U.L.R.* 345, 346.

It was argued before the Commission that the discretionary powers given to the courts by the *Matrimonial Property and Proceedings Act* 1970 were so wide as to render further reforms unnecessary. (One might expect the same case to be put in Australia where the Family Court has even wider powers than the English High Court.) The Commission rejected this argument on the basis that the discretionary nature of the High Court power meant that parties' rights were not ascertainable without a court order and that during the currency of the marriage (as opposed to the breakdown phase) no rights had accrued to the parties by virtue of their status as married people.[40] In other words, the fact of marriage ought to be a basis for creating defined and different rights between two people.

The U.K. Commission was reassured in their determination to introduce statutory co-ownership of the home by providing that a couple who wished to do so might always exclude statutory co-ownership by an express agreement between them, providing that certain formalities were observed. It would then be open to them to enter into any other type of arrangement with respect to the ownership of the home.[41]

The 'contracting out' provision was also seen as an essential safety valve in the other jurisdictions we are considering. The Ontario Commission pointed out that from the very fact that the home was generally the major asset, it followed that the law could not bind the spouse's rights in an immutable way. They felt that the minority of cases where an equal sharing rule could work hardship were thus provided for by the ability of those couples to make other arrangements.[42] Part IV of the 1978 Act also reflects the view. Saskatchewan[43] and New Zealand[44] also included provisions which enabled couples to contract out of their joint ownership schemes. The U.K. Commission's arguments in favour of legal co-ownership of the home were substantially adopted in New Zealand, Saskatchewan and Ontario, although they did not have the benefit of surveys after the nature of the one ordered in Britain.

We have now seen that

(1) In four overseas separate property jurisdictions we have law reform initiatives predicated on the need to make special provision for the matrimonial home and household chattels;

(2) The approach adopted has been to give the husband and wife equal shares in the matrimonial home;

(3) We have examined in outline the different schemes adopted in these four jurisdictions for bringing about equal sharing, as well as noting the original model provided in the pre-divorce jurisdiction of the Victorian Supreme Court.

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40 Law Com. Working Paper No. 42 paras. 0.21 to 0.23.

41 Law Com. No. 86. Third Report, Book I. paras. 1..27 to 1.149.

42 Ontario Report, at pp. 135-176.

43 Report to the Attorney-General, at p. 19.

44 *Matrimonial Property Act* 1976, s. 21.

As we embark upon the task of reforming matrimonial property (a) in Australia we need to consider these questions

(i) Are we, in principle, committed to a scheme whereby the matrimonial home is equally owned by the parties to a marriage?
(ii) Do the schemes presented in the jurisdictions we have been examining, or any of them, constitute a workable plan for achieving equal ownership?
(iii) Can we really justify the technique of isolating particular assets for special treatment by the law in any event?

We shall now consider these questions in turn.

LOOKING TO THE FUTURE: AUSTRALIAN MATRIMONIAL PROPERTY LAW

1. *The Principle of Equal Ownership: Do We Want It?*

We have seen that the U.K. proposal relied heavily on the result of the 1972 survey which appeared to signify a commitment by Englishmen (and women) to the principle of joint sharing. While 52 per cent of the couples surveyed owned their homes in joint names in fact, 91 per cent of husbands and 94 per cent of wives agreed that the home and its contents should be jointly owned irrespective of who paid for it. Unfortunately, the survey did not specifically ask the 91 per cent and the 94 per cent why they supported joint ownership. Such a question was asked of the couples who were joint legal owners of the home and the reason most frequently given was that co-ownership provided automatic transfer on death. (51% of these couples gave this answer). Other reasons were that both spouses contributed to the acquisition of the house (25%), death duty advantages (25%), and that they had acted on professional advice (14%). Only 14% gave as a reason the security and protection of both parties, while 30% said they believed in the jointness of marriage.[45]

It is not inappropriate to speculate as to whether the same commitment to the concept of *joint ownership* would have been manifest in Britain if the law were first changed so that joint ownership no longer resulted in automatic transfer on death and so that there were no taxation advantages associated with joint ownership. Conversely, one might speculate on whether a statutory co-ownership scheme would be necessary at all if the benefits of voluntary joint tenancy were sufficiently attractive. In short, the survey may have provided a misleading picture of couples' commitment to the principle of statutory co-ownership as a matter of matrimonial justice. Moreover, the applicability of the survey's findings to Australian couples is somewhat speculative.

The other comment which may be made about the survey is this: the statistics show a steady increase in the proportion of newly married owner-occupier couples who own the home jointly; in 1970-71 it reached

45 *Matrimonial Property* by J. E. Todd and L. M. Jones, H.M.S.O. 1972, at p. 11.

74% and we are told that the upward trend is still continuing.[46] It would appear, therefore, that joint ownership has become the prevalent practice by the choice of the couples concerned; and that legislation is unnecessary in the case of about three quarters of young couples.

The question, then, becomes whether a global co-ownership scheme is warranted for the small proportion of couples who do not enter into voluntary joint ownership of the home. In some of these cases, the home may be registered in the name of one only due to a mutual decision to maintain a separation of capital. In other cases, the credit arrangements of the couple render it advantageous for the home to be owned by one of them. To be sure, there may also be instances, within this group, of injustice to the non-titled party particularly if that happens to be a wife who has devoted herself to caring for the home and family and has thus disqualified herself from acquiring assets. Certainly, a spouse with title may sell the home over the head of the other party and this, undeniably, produces injustice. However, it is questionable whether a comprehensive scheme of co-ownership is needed to cure these cases. Perhaps these specific wrongs may be redressable by tailor-made remedies. Universal joint ownership might be felt to be a disproportionate cure to a limited problem.

A more fundamental objection to the proposed reform lies in the argument that it is unjustified to impose a rigid arrangement on all marriages regardless of the style of living of any given family. The Law Commission was aware of this objection but regarded the merits of the situation as favouring joint-ownership nevertheless.[47] Moreover, while our assumptions as to the permanence of marriage and the stereotypic role of the husband and wife are still widely held, life styles and expectations have so changed over the last twenty years that it does not seem justified to impose universal and automatic joint ownership in the home regardless of the character of the individual marriage and its duration. Fixed property rights within a marriage might ultimately cause more dissension and injustice than they would alleviate. Many writers see the traditional exercise by the courts of discretionary 'adjustment' powers as achieving a greater measure of justice than inflexible rules.

Those who are committed to a joint ownership principle are reassured that unfairness in individual cases can be catered for by agreement between the parties. In other words, the way to avoid injustice to parties is to allow them to 'contract out' of the scheme of the Act.[48] This reply is unsatisfactory. First, it has been found that where antenuptial contracts have been available to spouses they have rarely been employed. Thus, an American writer observes that 'it is a fact well known to all practising lawyers that most married couples do not enter into ante-

46 Law Com. No. 52, para. 23.
47 Law Com. No. 52, paras. 10, 26, 27.
48 See *ante*.

nuptial agreements'.[49] Moreover, heavy reliance on agreements which enable people to opt out of the generally applicable law is not without problems. The very factors which make it difficult to sustain marital relationships also limit the usefulness of an agreement shaped by the attitudes of the parties which are present at one particular point of time. Attitudes change so that the premises of a relationship may alter, new responses must be found, earlier positions reversed. Moreover, as a practical matter, either contracting out has to be formal and in writing or it may be informal and could be implied from the spouses' conduct. If the legislature goes for the former solution then injustice would result where formal requirements were not complied with. It is unrealistic to expect newly weds to enter into formal agreements which are entirely at odds with their hopes for the future. On the other hand, if the legislature allows for implied contracts the reform would result in a mere rebuttable presumption in favour of joint ownership, a solution which was rejected in the U.K., Saskatchewan and Ontario. It is unwise, therefore, to assume that the injustices associated with universal joint ownership can be prevented in large part by providing couples with the right to 'contract out'. While freedom to make ones' own contracts is an essential feature of any matrimonial property law it is not to be relied upon as a panacea for problems created by imposed and rigid systems.

2. *Equal Ownership Schemes: Do They Really Work?*

That a universal joint ownership system works rough justice is confirmed by the compensation devices in the legislation we are considering. In the U.K., for example, the Commission anticipated the hardship associated with the purchase of a new home by a couple after selling a previous matrimonial home. If one spouse outlaid all the purchase moneys for the new home, he could then claim against his partner in respect of half the value of the previous home by way of contribution to the new one. The Commission then outlined enforcement procedures which might be undertaken against the non-paying spouse.[50] The ramifications of such a scheme, for matrimonial harmony, are somewhat disturbing.

However, the most dramatic compensatory device in the U.K. proposal is the retention of the power of the court under s. 24 of the *Matrimonial Causes Act* 1973 to adjust the property rights of the parties upon principal relief proceedings in respect of the marriage. The rationale is that, 'the justice done on divorce needs to be precise rather than broad and needs to take account of not only . . . the individual spouses . . . but of . . . the children as well; and all the family assets have to be available for the exercise of the court's discretion'.[51]

49 Bartke, at p. 253. He observes that during the period July 1, 1970- to December 31, 1973, 189,000 marriages took place in Quebec, but only 318 couples filed agreements contracting out of the legal régime (at p. 259).

50 Law Com. No. 86. Third Paper, Book I. paras. 1.368 to 1.369.

51 Ibid, par. 1.82.

It is submitted that to retain the adjustment jurisdiction of the court in respect of the home on divorce is to render statutory co-ownership insignificant when the circumstances decree that it should be most relevant. Defined rights in the home are least important when the family is functioning well. To depart from co-ownership on divorce is to emasculate the scheme, but the adjustment jurisdiction has been retained to prevent injustice arising.

The other overseas schemes we have been considering have stopped short of retaining the adjustment jurisdiction on divorce, but have a variety of measures designed to prevent injustice, many of which could, if liberally invoked in the courts, run a coach and four through the principle of automatic co-ownership itself.

Thus, in Saskatchewan, clause 21 of the draft Matrimonial Homes Act establishes jurisdiction in the courts to make orders varying the normal half-interest in the home so that a spouse could be left with an interest which is less than half, or no interest at all, in the home. The grounds on which the judge may vary ownership are that equal sharing is unconscionable either because of extreme economic misconduct, the short duration of the marriage or other exceptional circumstances. The Saskatchewan Commission explains that, 'Examples of "extreme economic misconduct" might include situations where at . . . marriage breakdown, one spouse feathers his . . . nest by denuding the spouses' joint . . . accounts . . . or otherwise squanders or is recklessly wasteful of the family assets'.[52] Similarly, it was felt that the 'short marriage' clause was necessary to prevent unfairness where one spouse owned the house at the time of the marriage and the couple separates a short time later. It would be unconscionable to give the other spouse a half-share in that home.[53] One might speculate that the 'other exceptional circumstances' which would enable a court to vary the parties' interests might be rather numerous. Certainly, many people will find it worth litigating to try to secure a variation in their favour. That might not represent a substantial improvement on the present law.

Similarly in Ontario, while there is no general adjustment jurisdiction retained on divorce it is contemplated that the court may unevenly divide family assets if equal division would be inequitable having regard to the factors set out in s. 4 (4) (f) of the 1978 Act.

While it may be said that such provisions are essential if injustice is to be avoided they conduct to incertainty in the application of the equal division principle.

The Ontario Act, at least, avoids the grosser excesses of the Ontario Commission report. The Commission felt that co-ownership could be varied by contract between the parties. Moreover, the contract need not be express. An implied contract would also be effective.[54]

One may conjecture that the number of parties who would have been

52 Report to the Attorney-General, at p. 108.
53 Ibid.
54 Ontario Report, at pp. 135-136.

pleased to resort to an implied contract to vary co-ownership might have been legion. Happily the Act avoids this peril and stipulates clearly in s. 54 that 'domestic contracts' and variations of such contracts must be written and duly signed and witnessed. This is in harmony with U.K. recommendations that there be special formalities for contracting out of the legislation.[55]

In New Zealand, the *Matrimonial Property Act* 1976 also contains extensive exceptions to the joint ownership principle. For example, there is no equal division if the marriage is of short duration *i.e.* usually 3 years or less.[56] In that event, the home (*and* chattels) are divided in accordance with the respective contributions of the spouses to the *marriage partnership* (*N.B.* contribution to the relevant assets is not the test). If the concept of a court assessing the respective contributions of the parties to the marriage is somewhat daunting there is an even more general exception than the short marriage rule, in s. 14. Section 14 enables the court to depart from equal division of the house and chattels where, 'there are extraordinary circumstances that in the opinion of the Court render (equal sharing) repugnant to justice'. Like the Saskatchewan analogue this section, it is submitted, is likely to lead to uncertainty and litigation. Moreover, whereas moral conduct is specifically deleted as a consideration under Saskatchewan's cl. 21, s. 14 lays the way open for argument that matrimonial misconduct may be an extraordinary circumstance. And while the New Zealand courts have declined to regard unequal contribution to the property as in itself an 'extraordinary circumstance'[57] the potential for phrases such as this, as well as the concept of 'repugnant to justice' have prompted at least one writer to nominate s. 14 as, 'the bane of the *Matrimonial Property Act* 1976'.[58] And while the courts have been sparing in finding that exceptional circumstances exist[59] and while it may currently be said that, 'Neither husbands nor wives can claim that as a class, they are unfairly treated in the division of domestic property'[60] the exceptions to the rule may one day destroy the certainty of the rule itself. Moreover, as we have noted already, equal division has its victims. Fisher observes that, 'a new class of maltreated spouse has sprung into being: the major contributor to the domestic property e.g. a husband or wife who brought the home into the marriage from pre-marriage property or subsequent gift or inheritance'.[61]

We may have reached the unhappy stage in our consideration of schemes for joint ownership when we find that if we have automatic co-ownership we are in the position of causing a great deal of injustice, whereas if we allow for exceptions to the rule to accommodate for hard

55 See *ante*.
56 S. 13.
57 See cases discussed by D. B. Collins. 'Section 14 — The Bane of the Matrimonial Property Act 1976' [1977] *N.Z.L.J.* 238, 242.
58 Collins, n. 77 *ante*.
59 See cases discussed by R. L. Fisher, at p. 375.
60 R. L. Fisher at p. 376.
61 Ibid.

cases we destroy much of the value of the rule itself — *i.e.* the benefit of placing on a footing of certainty and fairness throughout the marriage and on its termination the property rights of the parties. Indeed, at the end of it all, one might question whether the elaborate schemes for sharing the home that we have considered have achieved very much more than the simple rebuttable presumption of law created by s. 161 of the Victorian *Marriage Act.*

3. *Special Treatment of the Home and Household Goods: Is it Justified?*

The concept of special treatment of the home and household chattels is not without its critics.

As a prominent Canadian writer has said,

> The intense preoccupation of English lawyers and legal writing in the past decade or so with the 'matrimonial home' has caused some surprise and mystification to lawyers in other countries, who tend to think that English marital property law is all about whether the English married woman's cash or mortgage bought home is or ought to be her castle. A civil lawyer would be likely to regard a régime of 'community reduced to the matrimonial home' as a very unbalanced and illogical design.[62]

It would be hard to find informed opinion where community systems apply that such legislation is a worthy substitute for a comprehensive and balanced scheme of marital property law. Our Canadian writer points out that the proposed U.K. legislation does not solve basic problems in paradigm cases which it was designed to serve. For example,

> In the divorce or breakdown context, the example usually cited as needing protection is the deserted wife with young children and little or no income. What additional protection will the recommendation afford her in the case where she is living in a bought home which is in her husband's sole name? If she stays in the home it is an unrealisable asset, but any mortgage, taxes or other payments will have to be kept up. She can find other accommodation and get half the proceeds of sale. This capital realisation may then be taken into account in the calculation of any award of maintenance. If there is a substantial mortgage, half the net sale proceeds may not amount to so much. A deserted wife with young children and no means, who had been living with her husband in a rented flat or house will receive no benefit from a matrimonial community law, and it will discriminate against her for no apparent reason.[63]

Moreover, the logic in the argument that one deals with the home because it is anyhow the most substantial asset, is elusive. If the law is prepared to take on the task of distributing *most* of the couple's 'moneys worth' then it should be prepared to handle it all in a systematic way (*i.e.* to deal with the couple's actual assets, — which often include life assurance, pension rights, stocks, bonds, bank accounts, cars, furnishings, business or professional assets, vacation property). Baxter suggests the

62 I. Baxter, 'Reports of Committees' (1974) 37 *M.L.R.* 175.
63 Ibid, at p. 177.

following hypothetical cases as demonstrating the lack of consistent objectives involved in separately treating the matrimonial home.

> Mrs. X owns £5,000 in stocks and bonds, (from her father) and lives in a modest matrimonial home in the London area, purchased quite cheaply, but now (due to recent large increases in real estate values) worth £24,000. Under the proposed matrimonial home régime Mrs. X is worth £17,000. Mrs. Y has saved £1,000 from working as a nurse. She lives with her husband in a rented flat. Mrs. Y is worth £1,000. In North America, many married couples live in rented apartments and the big urban centres have many apartment blocks. An arbitrary discrimination between the marital property position of the couple that rents a home and the couple that rents money to buy a home seems illogical and unjust, but this will happen under a régime of community reduced to the matrimonial home.[64]

Similar views have been expressed by a New Zealand writer after some experience with the deferred community scheme in force there since 1976. Fisher regards the distinction made between famliy assets and other property as a source of problems and ascertaining the extent of the homestead (where that is an issue) difficult. He feels that the provisions treating domestic property (*i.e.* the home and chattels) as different from other matrimonial property, should be repealed.[65]

It is this writer's view that the elaborate overseas schemes for co-ownership of the matrimonial home we have examined are unattractive in principle and beset with problems in practice. The notion of singling out the home and contents for special treatment would seem to have little to commend it, except insofar as it would seem to be better than nothing.

At the moment, in federal jurisdiction under the *Famliy Law Act*, we have, by way of guiding principles for allocating property between spouses, regrettably close to nothing. We have seen that the response to the practical problems of administering an automatic and universal joint ownership scheme so as to avoid gross injustice has been to include provisions which may be inimical, in the last resort, to the scheme itself, whether this response has been to retain the adjustment jurisdiction, as in the U.K.; or to allow liberal exceptions for hard cases as in Saskatchewan, Ontario and New Zealand. It has been suggested that these intricate and detailed schemes may have achieved little more than the monolithic s. 161 of the Victorian *Marriage Act* 1958 which, as we have seen, creates a rebuttable presumption of joint ownership of the matrimonial home. If that is all that we really want, then it is open to us to amend the *Family Law Act* to incorporate such a presumption, alongside the broad discretionary powers already wielded by the Family Court of Australia.

Sackville, who favours the retention by divorce courts of wide discretionary powers, suggests a number of reforms to s. 161 which would,

64 Ibid, at p. 178.
65 R. L. Fisher at p. 380.

in his view, render it a more effective mechanism for sharing the matrimonial home.[66] If we were to amend s. 161 in the way that Sackville suggests, then we would have a provision which was not substantially less effective than the elaborate overseas provisions which we have considered in bringing about joint ownership. We could also examine some of the overseas models' proposals for ensuring better protection to an unregistered co-owner in terms of mandatory consent requirements for dealings associated with the home. We might also need to formulate policies on questions such as the inclusion of homes which were a gift to one party only, or homes which were owned by one party prior to marriage. The problem of short marriages would also need to be considered but substantially we have a ready model for a joint ownership scheme.

But are we committed to such a scheme? It is suggested that the home and chattels solution smacks strongly of a compromise between the twin dilemmas of dissatisfaction with the paucity of the property provisions in our federal legislation and a fear of embarking on a general restructuring of the present scheme of separate property with its overlay of wide judicial discretions, on the grounds that such an undertaking might be too big. However, it may be that big undertakings will need to be contemplated if we are to resolve big problems.

C. *HOUSEHOLD CHATTELS*

There is currently no legislation in Australia dealing with the position of household chattels. Their disposition under State law depends on findings of ownership made on the basis of a separate property enquiry as to who bought the chattels and who was the intended beneficiary in the event of a joint purchase or a gift. The Family Court, on the other hand, may inhibit dealings with property by the use of the injunctive powers in the *Family Law Act* 1975[67] or it may distribute household chattels under its adjustment jurisdiction on principal relief becoming relevant under s. 79, or declare existing rights according to the general law of property under s. 78.

The Family Court would seem to have fairly extensive powers under s. 114 (1) to give injunctive relief with respect to dealing with house-

66 R. Sackville, 'The Emerging Law of Matrimonial Property' (1970) 8 *M.U.L.R.* 353.
Sackville suggests that 'Too much attention is paid to the intention of one or both of the parties at the time of the acquisition of the asset and too little to the siuation the paries will be facing in the future. The legislation would be more effective in complementing the laudable goals of the farmers if it openly empowered them to readjust the parties' proprietary rights for the future in light of the breakdown of their marriage. This could be achieved by repeal of the 'common intention' restriction upon the court's discretion and by an amendment ensuring that rebuttal of the statutory presumption of joint tenancy does not deprive the court of its residual discretion to reorganise the parties' proprietary rights. Moreover the statutory presumption should not be prevented from coming into effect merely by reason of the subjective intention of the spouse acquiring the property in dispute', at p. 373.

67 Section 114.

hold goods although some limits have been imposed on invoking s. 114 (1) prior to principal relief becoming available, *i.e.* an injunction under these circumstances must be personal to the applicant and limited in duration so as not to encroach on the power to alter property interests under s. 79.[68] Notwithstanding these limits, the Family Court has extensive powers to deal with household goods belonging to the parties. However, it would seem that these are invoked rarely prior to divorce notwithstanding that injunctions excluding a party from the home are not uncommonly sought. Instead the uncertainties of ownership associat- with our separate property régime, and the more immediate results which may be achieved by taking the law into one's own hands, encourage a resort to self-help, should the marriage fall upon hard times and many embattled spouses have returned to find their homes stripped of furniture and effects. Possession of household goods based on brawn and access to a truck often amounts to ownership to all intents and purposes so that by the time property comes to be divided essential items may be irrecoverable and substantial hardship may have been endured. The question is what should be done to alleviate this position.

Two approaches are taken in the legislation:

1. Regulation of use and enjoyment of household chattels without affecting ownership;
2. Equal sharing of household goods, *i.e.* dividing them between the parties.

Saskatchewan and the U.K. have taken the former approach. New Zealand has adopted the latter. Ontario's new legislation represents both in that household goods will ordinarily be shared as family assets on dissolution but if the court makes an order for possession of the home it may also make orders with respect to the use of contents of the home.

We shall examine these schemes in detail:

In New Zealand, family chattels fall under the same rules as the matrimonial home *i.e.* they are regarded as being owned equally so that a money claim for half their value is available when the marriage ends or, alternatively, on the bankruptcy of a spouse or when proceedings for equalization are taken on the grounds that the property is being dissipated or mismanaged.[69] An application concerning a specific item of property, however, can be made at any time.[70] Moreover, a party may apply under s. 43 to the Court to restrain a disposition which is meant to defeat the claim or the rights of another, or to set aside such a disposition provided it has not involved a purchaser for value in good faith. In addition, once proceedings have been initiated under the *Matrimonial Property Act* there is a freeze on dealing with family chattels or removing them from the home under s. 45. Moreover, there is a wide defini-

68 *Tansell* v. *Tansell* (1977) 4 Fam.L.R. 11.466.
69 Under s. 25 *Matrimonial Property Act* 1976.
70 Section 25 (3).

tion of family chattels in s. 8 which covers pets and caravans although it excludes business assets.

The Ontario Act, like that in New Zealand, causes household goods to be divided equally between the parties in the normal course at the end of the marriage, *i.e.* they will be caught by the definition of family assets in s. 3 (b) of the Act, although the scheme in the Ontario legislation lacks the sophistication and detail of the New Zealand legislation).

The extent of these provisions, however, can be easily overestimated. It must be remembered that sharing does not take place during the marriage. There is no equalization claim until dissolution (*i.e.* it is a posthumous community). While no proceedings are contemplated and the spouses are pursuing their joint married life neither spouse has any claim or rights in respect of household chattels against the other spouse.

In the interim, the title holder can deal freely with such property during the marriage and apart from bringing proceedings for equalization there appears to be little that can be achieved by the courts to protect the non-title-holder against dissipation of this property. Moreover, the parties' interests in family chattels in New Zealand are subject to matrimonial debts, secured personal debts and unsecured personal debts which exceed the amount of their respective, separate property.[71] The other factor which lessens the impact of equalization is that both Acts allow the court to depart from that position to avoid injustice (*i.e.* in s. 14 in New Zealand and in s. 4 (4) in Ontario).

The legislation in Ontario and New Zealand may not always succeed, therefore, in achieving economic justice between the parties by equalizing the claim of a wife who is often placed in a situation where she has inferior earning capacity within a marriage. However, provisions, such as s. 45 in both Acts, which prevents the furniture being, 'cleared out' (Providing one is quick to initiate proceedings), and the knowledge that in the ordinary course an equalization claim for half the value of the family chattels will follow constitute sobering constraints upon the urge to over-enthusiastic self-help. It may be noted here in passing, however, that a couple can only truly be said to be jointly owning household goods if sharing occurs through the marriage. A true community system aspires to this position. If the Ontario and New Zealand schemes of deferred participants fall short of this, they nonetheless avoid the excesses of the *every man for himself* mentality nurtured by our separate property system.

On the other hand, the notion of joint ownership of household goods was rejected entirely in the draft legislation prepared by the Law Commissions in the U.K. and Saskatchewan. The U.K. Commission eschewed joint ownership for a number of reasons.

> It would be difficult to apply a co-ownership principle to the household goods since they are numerous and liable to rapid changes; and whatever definition were chosen difficult problems would arise

71 Section 20.

> of identification and of tracing funds where old items were sold and part-exchanged for new items.

Also it was thought that co-ownership would not give appropriate protection for a spouse as the market value of the household goods was usually far less than the cost of replacing them.

> It would be of little value to a deserted wife to be awarded half the proceeds of sale or half the value of . . . goods if her husband had already sold them or removed them from the home. The amount received would usually be inadequate to cover replacement.

Accordingly, it was felt that the reform most needed was that to provide effective protection of a spouse's use and enjoyment of them.

The right to use and enjoy household goods was felt to be essentially an incident of the occupation of the home itself and primarily the role of the courts in making an order for 'use and enjoyment' was to render more effective occupation rights which might be awarded under the *Matrimonial Homes Act* 1967.[72] However, it was contemplated that the party leaving home could sometimes acquire an order for use and enjoyment.[73] The Commission arrived at a broad test of household goods as meaning, 'any goods including a vehicle which are or were available for use or enjoyment in or in connection with any home which the spouses are occupying or have at any time during their marriage occupied as their matrimonial home'.[74] The concept of a right to 'use and enjoyment' was not to arise as a matter of law in the person in occupation of the home, but would arise on the granting of an application by the court.[75] An even greater limitation on the U.K. scheme is that the jurisdiction to make use and enjoyment orders only endured for the subsistence of the marriage. It was felt that the panoply of power at the disposal of the divorce court would suffice after that time.[76]

The Saskatchewan proposal is substantially modelled on the U.K. scheme although there are significant differences. Like the U.K. model the Saskatchewan draft contemplates that the right to possession of goods is primarily to give effect to the right to occupy the home. Accordingly, it was felt that there should be a freeze on dealings with household goods until a court order could be obtained. Goods were, until that time, to remain in the home.[77] The Saskatchewan provisions clearly aim at preventing the *de facto* disposition of goods by stealth. This objective is perhaps better attained there than under the U.K. proposal and under s. 45 of the Ontario Act[78] where dealings are proscribed only after an order has been obtained from the court.

We have noted significant differences in approach as to the nature of the parties' interests in household chattels sought to be protected in the

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72 Law Com. No. 86. Third Report Book III paras. 3.05, 3.08, 3.09.
73 Ibid, par. 3.44.
74 Ibid, par. 3.104.
75 Ibid, par. 3.25.
76 Ibid, paras. 3.43 to 3.45.
77 S. 40 *Matrimonial Homes Act* (Sask.) (draft).
78 *Family Law Reform Act* 1978 (Ont.)

various schemes under consideration. Other differences are apparent *e.g.* in the classification of the goods which are the subject of the special legislation. The 'family assets' which are subject to equal division in Ontario under s. 3 (b) of the 1978 Act comprise a category which is wide enough to cover a holiday home owned by the parties. However, the ability to order that goods remain in the house in support of an order for possession is confined under s. 45 (1) (c) to the, 'contents of the matrimonial home'. The U.K. proposal is similar in that it is confined to goods used in association with the home.[79] Moreover, while s. 45 (1) (c) of the Ontario Act and the U.K. recommended section[80] leave it to the discretion of the court to determine, on broad tests, whether an item is to be regarded as falling within the household goods concept for the purposes of the legislation, the Saskatchewan approach is to detail these very specifically and there are specific provisions dealing with jewellery, antiques, children's personal effects, business items and others.[81]

In the result the family car will generally be equally shared under the New Zealand Act and the Ontario Act — but is not able to be the subject of an order for 'use' under s. 45 of either Act. It may be 'used' under the proposed English law[82] but not under the Saskatchewan counterpart on the basis that it is not essential for daily housekeeping.[83]

Differences in detail aside, however, we have noted that these four jurisdictions have detailed comprehension schemes whereby household goods are to be the subject of orders for sharing or, alternatively, orders for use and enjoyment. We shall consider schemes for sharing family property a little later,[84] but for the moment it is appropriate to consider whether the Australian law might not benefit from conferring on the courts an ability to make orders for use and enjoyment of household goods.

First, we have noted that use and enjoyment orders have been felt to be an adjunct to the right to occupy the home. This nexus is made in the U.K. proposal, s. 45 in Ontario and in Saskatchewan where there is an actual embargo against removing the goods from the home.[85]

However, this writer feels that to unduly emphasise the nexus between the right to the goods and the occupation of the home might be indicative in the legislation of a 'desertion' mentality rather than a 'separation' mentality. By this it is meant that there would seem to be an assumption that because a party has left home that party is a deserter. In actual fact, it is recognised that a party may have no choice but to leave the home and often, having undertaken the expense of providing alternative housing, will be in a situation of some considerable need which would

79 Law Com. No. 86 Third Report Book III par. 3.104.
80 Ibid, par. 3.109.
81 S. 39 *Matrimonial Homes Act* (Sask.) (draft).
82 Law Com. No. 86. Third Report Book III, par. 3.116.
83 Report to the Attorney-General, at p. 162.
84 See *post.*
85 See *ante.*

extend to basic furnishings. It is submitted that there is no necessary connexion between the right to occupy the house and the right to use and enjoy household goods.

But the 'use and enjoyment' approach to household goods has additional drawbacks. To allow household goods to be used by one party to the exclusion of the other can produce a misleading picture of the distribution of assets between the parties. If one party is to be prevented for a considerable time from having the enjoyment of these items then to all intents and purposes he frequently has forfeited any meaningful rights in them. A man whose wife has obtained the right to use and enjoy their household furniture, appliances and even the car effectively has to replace those items or a substantial number of them. The knowledge that the refrigerator and the car will revert to him in the remote future when his children leave home might be felt to be of academic interest. It might have been more honest to divide these assets on an ownership basis. This would at least present a more realistic picture of the division of assets between the parties both within the marriage and on its termination. The ability to dispense relief which is largely injunctive would then only be required as an interim measure pending the resolution of any disputes there might be as to the ultimate ownership of household chattels as well as other family property. From this point of view, s. 4 of the Ontario Act and the New Zealand law which are concerned with ownership rights would seem to be superior to the 'use and enjoyment' approach. However, separate property jurisdictions are understandably hesitant to embark on projects which undertake a sharing of matrimonial assets for this is a task of some magnitude. For the moment, however, one feels that the 'use and enjoyment' schemes in England, Ontario and Saskatchewan represent another instance of the thinking that we have already confronted on the question of the matrimonial home (*i.e.* that doing something is better than doing nothing at all). This is particularly true in England where the 'use and enjoyment' legislation expires as soon as the divorce court takes jurisdiction.

Indeed, the motivation for special treatment of the household chattels is not entirely clear. The U.K. Law Commission noted the following comments, *inter alia*, which followed the circulation of working paper No. 42:[86]

> (a) that it is rare for a husband on leaving home to deprive his wife of the use of the goods; and
>
> (b) that in divorce proceedings the parties do not usually invoke the existing powers of the court in relation to household goods because they arrive at agreement about them.

The Commission nevertheless, felt that, 'in the light of consultation we remain convinced that a spouse's use of the household goods . . . needs to be protected by law'.[87] One can only observe that the area of household goods, if these observations are correct, would seem to be charac-

86 Law Com. No 86. Third Report, Book III, par. 3.22.
87 Ibid, par. 3.23.

terised by a standard of considerate and rational behaviour unknown elsewhere in domestic disputes. Moreover, if the comments are accurate one would have thought that there was little need to legislate here at all.

A similar confusion of aims is manifest in the provisions which allow the making of use and enjoyment orders in favour of a party who is in the home as well as in favour of one who has left home.[88] Yet the avowed aim of the legislation is to render occupation rights in the home more effective. In short, the proposed legislation for use and enjoyment of household goods reflects objectives which are ill defined and sometimes self-contradictory.

As for adopting such a scheme into Australia, this writer is of the view that with some minor remedial measures our current *Family Law Act*, if judiciously invoked can, for the most part, achieve the objectives of the three models we are considering. Presently available injunctive powers in s. 114 could be applied towards ordering a party to leave household chattels within the home on the one hand, or, alternatively, to deliver over such chattels for the use and enjoyment of a party. The requirement in *Tansell's* case that such an order be temporary and personal[89] in nature would not seem to unduly impair the efficacy of such an order if it was sought prior to the full adjustment jurisdiction of the court being available. The problem of parties seizing goods rather than awaiting the decision of the court admittedly remains, and to this end we might contemplate the introduction of provisions such as those we have noted in Saskatchewan forbidding the removal of goods from the home until a court order can be obtained or until some agreement can be reached. While not subscribing to the view that rights to chattels are bound up with rights to occupy the home, this writer suggests that such a provision, properly backed by sanctions, might go some distance towards curbing the current tendency to resolve disputes over household goods by resorting to a truck. However, one would be reluctant to freeze goods in this way, in the light of the frequent cases of hardship occasioned to the party who needs to leave the home, unless one could be certain that the courts could respond with their available injunctive relief with some alacrity. (In New Zealand s. 45 contemplates that goods may be removed in an emergency, notwithstanding the general prohibition against removing goods from the home after proceedings have been initiated.) Better still, if the constitutional constraints on property proceedings predating principal relief could be overcome a speedy distribution of assets could be made by the Family Court promptly so as to allow the members of the family to know their position without the complications and misleading effects that we have observed in association with orders for use and enjoyment. In short, it is this writer's view that the legitimate role for orders for the use and enjoyment of family chattels is merely as an interim measure until property can be distributed on a final basis between the parties on a permanent basis. Moreover, it

88 Ibid, paras. 3.09 and 3.44.
89 See no. 68 *ante*.

is felt that, by and large, the Family Court has the powers that are required to this end, particularly if an efficient system of freezing matters is introduced together with the assurance that the Court would be able to make the requisite injunctions speedily.

In short, there would seem to be little to be gained by the introduction into Australia of an extensive scheme which deals specifically with the family's chattels.

However, there is one aspect of the question of household chattels which has been dealt with in the legislation that we have been examining which deserves closer consideration. Rights of third parties in respect of household chattels are possibly a greater threat to the security of the family than competing claims between the husband and wife. Seizure of household goods to pay creditors' debts causes more concern as such goods often have little intrinsic value and yet, despite this, their seizure is often insisted upon by creditors and causes considerable distress and disruption to family life. The Payne Committee in England[90] recommended as a matter of urgency that household goods needed to provide an essential home for the whole family should be exempt from seizure.

Another facet of dealings with third parties is the question of goods purchased on conditional sales contracts or hire-purchase transactions. Such goods are regarded in law, under what is essentially a legal fiction, as the property of the vendor until the final instalment is paid by the purchaser. Where payments are not made the vendor usually repossesses the goods as well as having an action on the covenant for repayment. Clearly, difficulties can arise where a purchasing spouse attempts to remove household goods from the home — or if he simply stops paying. The U.K. Law Commission took a position in respect of third parties' rights which was strangely preoccupied with the position of the third party to the total detriment of the family. Thus it was resolved that no order for use and enjoyment would attach in respect of goods which were on hire-purchase[91] or which were owned by one spouse in partnership with a stranger.[92] Similarly, if a spouse were to wrongfully sell household goods to a stranger after the making of a use and enjoyment order, then a good title would be conferred on the third party providing he was a *bona fide* purchaser for value. However, the apparent insensitivity of the Commission to the position of the parties to a marriage *vis-à-vis* third parties such as hirers may be better understood if it is realised that they were hopeful of substantial changes in the laws of hire-purchase and consumer credit.[93]

The New Zealand legislation, similarly confers no special protection in respect of third parties' claims against the matrimonial property (although s. 20 (2) confers a protected interest in the matrimonial

90 Committee on the Enforcement of Judgment Debts 1969 Cmnd. 3909.
91 Law Com. No. 86. Third Report Book III, paras. 3.53 to 3.158.
92 Ibid, par. 3.110.
93 Ibid, paras. 3.142 and 3.138.

home). Indeed, ss. 19 and 20 of the New Zealand Act have as their principal concern the protection of creditors.

On the other hand, the Saskatchewan and Ontario drafts are somewhat more constructive than the English proposal and the New Zealand Act with respect to the relationships of the parties to the marriage with creditors. Under s. 41 (1) of the proposed *Matrimonial Homes Act* to overcome the problem of goods that are technically owned by the seller who wishes to repossess goods which are partially paid for, or which are sought to be removed by the purchasing party, an attempt has been made to strike a balance between the rights of the two spouses and those of the unpaid seller. In the event that only one party is the purchaser under the agreement the other party is a stranger lacking rights under the agreement. The Saskatchewan Commission took the view that in that case the main concern of the unpaid seller is to be paid for the goods. Accordingly, the court is empowered to order that either or both of the parties must discharge the liability under a security agreement regardless of which spouse may have originally been liable to do so. Since the seller could theoretically refuse payments from the spouse who is a stranger to the original contract, the judge can require the seller to accept payments from such a spouse.[94] The Ontario Commission's proposal was very similar to the Saskatchewan scheme. The effect of the purchaser's spouse making these payments is to give rise to a beneficial interest in that spouse.[95] Both schemes also contemplate that the spouse who takes over a security agreement can be made to reimburse the one who commenced paying under the original contract. It is to be regretted that the Ontario Act does not implement the Law Commission's proposal.

The area of creditors' rights in respect of family property is an important one, and rather too large to be treated here. Moreover, it would appear that the Family Court takes a fairly restrictive view of its powers to deal with property in which third parties' interests are involved[96] so that ultimately it may be the province of the State legislatures. It is submitted, however, that the need for laws protecting family assets against third parties is rather more pressing than securing the interests of the couple *inter se*.

Decisions must be taken as to how to balance the need to protect family assets against the rights of third parties to security. It must be kept in mind that a law which is over generous to married couples may ultimately prove counter-productive, as strangers will withhold credit to them. However, there is a need for State legislation, perhaps along the lines of the Saskatchewan and Ontario schemes, to protect family assets. This concept has more appeal within Australia than any proposal for use and enjoyment of household chattels.

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94 Report to the Attorney-General, at p. 167.

95 Ontario Report at p. 160 paras. 42-48.

96 See the decision in *Page* v. *Page* [1978] F.L.C. 90-525.

Suggestions of this nature, and proposals for co-ownership schemes relating to the home or to other defined assets have some value, as far as they go. They do not, however, go to the heart of the matter. Separate property régimes all over the world are at a crossroads, and the real question for us in Australia is whether we wish to persevere with the difficulties inherent in that concept.

D. *THE FUNDAMENTAL ISSUE*

Perhaps the most important and most fundamental problem with the Australian law, federal and state, is that the law fails to create present rights to property in the spouse who lacks legal title. That person, instead of a certain and vested share only has the right to go to the court to ask for property to be allocated to him or her by the court.

The other overwhelming deficiency in our separate property system is that it provides no safeguards against a spouse who may dissipate family assets or, indeed, may deliberately divest the family of them. The law does not provide for the mutual protection of the spouses by limiting disposal of assets by the spouse with title or by prohibiting excessive or fraudulent gifts to other persons. Yet in Europe, Scandinavia and eight American States there is regulation of obvious wasting of property through riotous living or inordinate indulgence in luxuries. Sale of property to friends or relatives at nominal prices cannot be effected without answerability, and secret transfers and trusts may be disallowed.[97] The separate property mentality does not accommodate such restrictions however. Another criticism of separate property which is a fundamental problem is the role of the courts in the process of discovering ownership of family assets. The need to go to court to determine property entitlement is built into the system. Clearly the court must have a role as a remedial device if property disputes should arise. But the current law nominates the court as the place of first resort. In the result rights are uncertain and expensive to ascertain, and the parties' assets may be substantially dissipated in the legal costs of ascertaining them anyhow.

Moreover, the uncertainties fostered by our combination of separate property and judicial discretion extend beyond the situation of marriage and divorce. While it is not attempted here to deal with the law of succession, it should be pointed out that our law does not give a spouse property rights in the other's estate.[98] A spouse is able to completely disinherit his partner, subject only to a discretion in the court, since Testator's Family Maintenance legislation was introduced to provide for

97 There are only very slight concessions to the need to account in Australia *e g.* under s. 85 of the *Family Law Act* 1975 the court may undo or prevent transactions which set out to defeat proceedings under the Act. However, there is no wide-ranging power to protect assets generally.

98 Intestacy law does award a share to the surviving spouse but this is not because the survivor is regarded as entitled to a share of the estate, but rather because it is assumed that this is what most couples would wish at their death.

the maintenance of the survivor. Consistently with the concept of separate ownership the law has a very individualistic attitude to property matters between spouses at death. Moreover, the Family Provision legislation can be frustrated by the parties giving away property before they die. The legislation only operates on what is left behind and there are no provisions enabling a survivor to reach *inter vivos* dispositions.

Indeed, Family Provision legislation exacerbates the uncertainties associated with devolution of property in that if the testator leaves his property by will to anyone other than a dependant, the legatees will have great difficulty in ascertaining what property passes under the bequest in the face of an adverse claim by a spouse.

Similarly, uncertainty as between spouses affects creditors of the couples. Just as the parties are not sure what property rights they have so creditors of the couple find it difficult to know in advance what assets will be available for satisfaction of their claims. Our combination of fixed separate property rights and open judicial discretion is thus capricious and sometimes mischievious in its operation.

All this would seem to suggest that the concept of a separate property system within marriage has had its day. It is no coincidence that most countries with separate property régimes are in the throes of law reforms. Hence, the schemes we have examined in Britain, Canada and New Zealand. In Australia, too, the question is how we should proceed to change this position.

It is submitted that our overriding aim must be to put the whole subject of property rights flowing from marriage on a firm basis, so far as this is possible, as an incident of the marital status. They should not be left to become a bone of contention as an incident, not of marriage, but of marriage breakdown or some other crisis. Courts and legislatures have tried earnestly to apply bandaids to heal particular wounds. This is particularly true in England where the Court of Appeal has embarked on brave new doctrines (frequently without success) and Parliament has launched into piecemeal remedies to individual wrongs.[99] It may, perhaps, be the case that not enough bandaids have been used and that if more dressings are applied to more wounds the patient may be nursed to a state which is healthy enough.

But the efforts of the Law Commissions in Britain, Saskatchewan and Ontario to heal the ills associated with the home and chattels do not inspire confidence that family property law will be transformed thus. The New Zealand *Matrimonial Property Act* 1976 and the *Family Law Act* 1978 in Ontario are very much more ambitious undertakings, as in addition to the special provisions relating to the home and household chattels an attempt has been made to distribute the whole of the family's assets in a schematised way.

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99 E.g. the 'Palm Tree Justice' approach in the Court of Appeal which was quashed by the House of Lords in *Pettit* v. *Pettit* [1970] A.C. 777. Also the *Matrimonial Homes Act* 1967 and the *Matrimonial Proceedings and Property Act* 1970.

However, while no evaluation of individual schemes will be made here, we must define our objectives if we are to undertake law reforms to bring about a rationalised matrimonial property law. It is submitted that our aim should be

(a) To institutionalise some form of sharing of assets in order to create a more equitable property law.

(b) To create vested rights in assets in members of the family to avoid the uncertainty and unfairness inherent in a separate property system with a discretionary adjustment jurisdiction in the courts.

To say that an organised system is needed is to open the lid on a Pandora's box of problems and decisions which will need to be made.

It is probably accurate to say that most Australian residents would probably like to see the law provide for some sharing of property between husband and wife, regardless of who paid for it or who holds title. Are we prepared to say, however, that in every marriage the sharing should be equal? A policy on the proportions of sharing must be arrived at. Moreover, decisions will need to be made on which property is subject to sharing, *e.g.* should business assets be included, or only family assets? Should certain assets be excluded, *e.g.* property acquired prior to marriage or inherited property; gifts made to one spouse only; what of income from such assets? The other decision which would need to be reflected in any proposed scheme would be one as to when sharing should take place — *e.g.* should parties share during the marriage, or only upon separation, or upon termination of the marriage by death or divorce?

If we look elsewhere to existing property sharing régimes there are basically three types of matrimonial régimes in the Western World apart from the English system of separation of property. They are —

(i) Full Community of Property. This exists in South Africa and until a decade ago was the legal régime in France. In such a system the greater part of the assets and liabilities of the spouses, however acquired, form a community fund on marriage. Certain property is excepted and remains the separate property of each spouse.

(ii) Community of Acquisitions. This system was adopted by a number of American States. It was introduced as the legal régime in France from 1966. This excludes property acquired before marriage and gifts and legacies acquired after marriage from sharing, as well as in the main part, income derived from such property.

(iii) Deferred Community. This system which exists in West Germany and Scandinavia attempts to combine the advantages of community and of separation of property. During the marriage each spouse retains and administers his or her property however acquired. Once the marriage comes to an end, however, the gains made by both spouses during the marriage are computed and equalized between them. We have noted that many features of the New Zealand reform conform with the deferred community concept. The Ontario law does the same albeit with a narrower range of assets.

The differences in the three existing systems are as marked as their similarities. They do have in common, however, a guaranteed sharing of assets at some time in the marital history of the couple, be it at all stages or at the end (as in the deferred community model). Moreover, their rights are defined at marriage, as an incident of marriage, and not left to an affray when it is all over. Furthermore, all three systems impose restraints on the parties' ability to dispose of family assets for their mutual protection, *e.g.* certain transactions must be effected jointly and there are extensive injunction powers in the courts to resrain transactions which may be excessive or irresponsible, and penalties are imposed for fraudulent dealings which are proved to have been undertaken to defeat the other spouse's interest in property.

This is not the place for an exhaustive analysis of these systems. They each have much to offer, as well as problems of their own. Moreover, if we are searching for a new system we need not confine ourselves to existing models — *e.g.* the Saskatchewan Law Reform Commission has suggested that one could devise a combination of the known schemes which takes advantage of the positive elements of a given scheme while using another scheme to overcome its negative aspects. Three such composite approaches are suggested in the relevant Saskatchewan paper.[100] How then should we proceed in Australia to introduce a brave new matrimonial property law?

First, it is self-evident that in relation to property there is no rational model that tells us how to determine which way propery rights should be apportioned between spouses. To change the law of matrimonial property may be in form only an alteration in the isolated sphere of legal concepts but in substance the change will be one that affects fundamental human relations in the community. Any proposed new system must be designed to function in the reality of modern Australian society and not in some abstract socio-legal vacuum. Accordingly, we need to identify which aspects of social policy should be given effect to in formulating a schematised family property law. Our first task is to decide on a social policy which is rational, just and acceptable to the community.

It would seem imperative, therefore, to conduct research into the way Australian couples view their needs and obligations with respect to their property relationships and to adopt a property régime which best reflects their expectations.

Our next requirement is that we recognise exemptions from any scheme that we might wish to introduce as the legal régime because of its perceived superiority in all the circumstances. For people have diverse and often incompatible aspirations so that ultimately it may be that no single scheme can meet the requirements of the variety of circumstances and personal preferences found in Australia today. We have seen that the New Zealand Act allows couples to make alternative

100 Second Mini Working Paper 1974 'Division of Matrimonial Property', at pp. 26-28.

arrangements with respect to their property. The limited deferred community régime in Ontario also affects parties who have not entered into legally permitted private agreements of their own.

This right to contract out of any scheme has ancient recognition in countries with legal matrimonial property régimes, *e.g.* France, Germany, Scandinavia and various American States. Whichever scheme one implements as the general property system within Australia the ability of couples to tailor the law to their own individual requirements must be institutionalised and maximum choice allowed. Accordingly, the ability to enter into contracts which determine at the outset (subject to subsequent variation) the couples' property relations must be recognised. Under the present law such contracts are against public policy,[101] unless the couple go to the trouble of having them approved by the Family Court. However, the Family Court is unlikely to embark upon an unrestricted course of ratification of property agreements. For while one judge has indicated that he was prepared to approve such agreements without there being any principal proceedings imminent between the parties[102] the more likely view is that if the marriage continues to subsist further obligations might arise out of the matrimonial relationship so that a court would, accordingly, not be able to say that the agreement is a 'proper' one for the court to approve at any given time within the meaning of the *Family Law Act* 1975.[103]

This position needs to be altered so as to encourage parties to decide upon their property requirements and to reduce these to a contract. Far from being against public policy, in the generality a prenuptial agreement must be recognised as superior to most of the property provisions of a domestic relations law. The general legal property regime is thus recognised to be a contract which the law has an obligation to make for the parties to a marriage if they are too starry-eyed or negligent to make one for themselves.

CONCLUSION

We have noted the difficulties experienced in Australia, in common with other separate property régime countries, where the property relationships of a couple are not defined at the point of marriage but only upon its breakdown. We have seen that some countries have responded to the ills of separate property by initiating schemes which aim to specifically treat the matrimonial home and household goods in isolation from the rest of the family's assets.

We have examined such legislation, actual or proposed, in the U.K., New Zealand, Saskatchewan and Ontario to evaluate the policies sought to be implemented and the mechanisms for bringing these about. This writer finds this approach unattractive and would prefer to treat the various assets of the family in an integrated way. Moreover, it is felt

101 *Hyman* v. *Hyman* [1929] A.C. 601.
102 Watson J. in *Macsock* and *Macsok* (1976) F.L.C. 90-045.
103 E.g. Pawley J. in two unreported decisions on s. 87 (4) of the Act.

that, with respect to equal ownership of the home, justice requires that there be substantial and loosely defined exceptions to the scheme and that these, in the various proposals we have considered, have a tendency to cancel the benefits of the scheme.

In addition, legislation which proceeds on the basis that the home should be specifically dealt with because it is the most important family asset ignores the many married people who do not own their homes.

When we consider the proposals of the U.K. and the Canadian provinces for 'use and enjoyment' of household chattels, we find that they proceed on the basis of ill-defined objectives. However, if it is felt that 'use and enjoyment' laws would be useful in Australia then we already have the basis for such scheme under the *Family Law Act*, particularly if we were to adopt some of the measures we noted in overseas legislation to prevent the resort to self help when the marriage founders. This writer's view, however, is that 'use and enjoyment' orders are only useful pending a final distribution of assets between the parties. It is suggested that the protection of household chattels against creditors is a more pressing problem for the parties to a marriage than a resolution of their rights *inter se*.

Moreover, 'house and goods' schemes, in this writer's opinion, evade the issue in matrimonial property law. Property rights must be made to flow from the fact of marriage itself in a schematised way. They should not arise for determination for the first time in the trauma associated with marital breakdown. The alternatives to separate property need to be investigated and overseas models should be studied. Happily, there is no shortage of these currently on trial. The new laws in New Zealand and Ontario have antecedents in deferred community systems of respectable vintage in West Germany and Scandinavia although these prototypes have no 'home and chattels' priorities. On the other hand, newcomers to the reform arena have retreated from deferred community and it has been restricted in Ontario and rejected recently in Saskatchewan and British Columbia, following some dissatisfaction with the system in Quebec where it has operated for the last nine years. Moreover, that old war horse, the aridítional community system, has been rejuvenated and pressed back into battle with enthusiasm in California, Washington, Texas, Arizona and New Mexico. In those States, co-management by the parties has been introduced in recent legislative reforms which aim to provide for greater equality between the parties to the marriage while retaining the essential characteristic of sharing matrimonial assets. In general, it is provided that each spouse has absolute authority to deal with all community property acquired during the marriage. There are certain specific transactions which require joinder of the spouses, such as transactions involving real property, but in day-to-day affairs either spouse has the capacity to deal independently with the community assets. British Columbia may be leading the way as a separate property system which is ready to embrace the concept of

community property with co-management.[104] This concept we have seen has its admirers and certainly merits investigation.

However, this is not the place to suggest directions for the total reform of matrimonial property law in Australia. We need first to ascertain what our objectives are and to define the policies we seek to pursue. We need to acquire a strong sense of what marriage means in Australia in terms of people's expectation of property relationships. Hopefully, with this knowledge, and with extensive study into available alternatives, as well as a willingness to innovate, we can then devise laws which reflect our requirements.

104 British Columbia Royal Commission on Family and Children's Law, (Report on Matrimonial Property) (Victoria) Queen's Printer 1975.