COMMENTS

"PROPERTY" AND DISCRETIONARY TRUSTS UNDER THE FAMILY LAW ACT, 1975-1976

Under the new system of family law which came into operation in Australia with the Family Law Act, 1975 (Cth.), the grounds for divorce have become largely non-contentious. Divorce can now be seen primarily "as a process of economic readjustment",[1] with the central problem that of ensuring economic security for members of a broken family. One of the major difficulties facing any system of divorce law is that of doing justice to wives.[2] In terms of property resettlement (as distinct from maintenance), s.79 of the Act governs. It provides:

> "(1) In proceedings with respect to the property of the parties to a marriage or either of them, the court may make such order as it thinks fit altering the interests of the parties in the property . . .
>
> (2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order."

S.79 thus allows the court, if it considers it just, to transfer property from one party to another. In determining the width of that jurisdiction, the definition of the word "property" becomes crucial, for a party must have property before the court can act. The definition of property is to be found in s.4(1):

> " 'property', in relation to the parties to a marriage or of either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion."

This definition is far from precise, and it is no wonder that it has come up for consideration in a number of recent cases. In *Komaromi* v. *Komaromi*,[3] the wife sought an order that the husband transfer to her all his interests in the matrimonial home. Their joint interests in the home existed under an agreement between them and the Housing Commission's bank, whereby they would become owners of the house when their last loan payment on the home was made—in effect, a contract to purchase.[4] The question arose whether the husband's rights under the contract to purchase were 'property' for the purposes of s.79(1). Hogan J. held they were not. He said:[5]

> ". . . I am of the opinion that the jurisdiction of this court under s.79 of the Act is restricted to making orders in respect of corporeal property of the parties or either of them being property, whether in possession or in reversion. Such property includes both realty and personalty to which a party has the immediate right to possession or to which in the case of realty a party has a claim in reversion. It would, for example, include choses in possession but not choses which are merely choses in action, for example a patent or a copyright or a mere

1. Eekelaar, *Family Security and Family Breakdown* (1971), 231.
2. The Law Commission, *Reform of the Grounds of Divorce. The Field of Choice* (1966) (Cmnd. 3123).
3. (1976) F.L.C. 90-142 (CCH).
4. Meanwhile, they were let into possession of the house as lessees.
5. (1976) F.L.C. 90-142 (CCH), 75, 696.

> right to bring a cause of action or a claim under contract or shares in a company."

Here the husband's rights were under a contract of purchase, and this was not corporeal property.[6]

The conclusions to be drawn from such a view are startling. A husband may avoid the jurisdiction of the court by transferring his property into incorporeal form. By simply turning his assets into shares, he removes all his property from the jurisdiction conferred by s.79, which is thus rendered nugatory.[7] This extremely narrow approach adopted by Hogan J. must, it is submitted, be misconceived.

His Honour in fact reached his conclusions on the basis of two arguments. First, he was impressed by the fact that the definition of property for the purposes of s. 79 was virtually identical to that in the (now repealed) s.86(1), Matrimonial Causes Act, 1959-1966. This section had given the court power to make "such a settlement of property to which the parties are entitled (whether in possession or reversion) as the court considers just and equitable . . .", and the section had been interpreted to give the court jurisdiction to settle property only where there was a clear, identifiable right in an existing item. As Windeyer J. said in *Sanders* v. *Sanders:*

> "an order that one party should settle a sum of money not being any existing separate fund upon the other is not an order which can be made by virtue of sec. 86(1)."[8]

As the definitions were similar, Hogan J. felt he must interpret the word "property" in the same way as in s.86(1).[9] But there is no rule of statutory interpretation that words *must* be construed in an identical way to previous statutes.[10] The overriding principle is surely that words must be construed according to the "legislative purpose and intent of a statute as revealed by its content . . ."[11] Moreover there is a significant difference between s.79(1) of the Family Law Act, 1975-1976, and s.86(1) of the Matrimonial Causes Act, 1959-1966. S.86(1) only allowed the court to make *"a settlement of property"*. Not surprisingly the Courts defined "property" as property that was capable of settlement. But s.79 allows the Family Court the wider power of "altering" property rights.

Secondly, Hogan J. clearly had difficulties with the words in the s.4(1) definition of property, "whether in possession or reversion". He took these as qualifying the word property and read them as limiting the types of property to those only which were held in possession (or in the case of land, also in reversion).[12] But as will be seen,[13] the words "in possession or reversion"

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6. His Honour also thought that a contract to purchase did not give the purchaser an equitable interest. With respect, this view is incorrect as long as specific performance is available: *Lysaght* v. *Edwards* [1876] 2 Ch.D. 499.
7. In a sense all rights in real property are incorporeal. One speaks of having rights in a fee simple, a life estate, a lease, rather than rights in the land itself.
8. (1967) 41 A.L.J.R. 145. See also Walsh J. in *Smee* v. *Smee* (1965) 7 F.L.R. 321, and *Dimov* v. *Dimov* (1971) 17 F.L.R. 462 (a partner's interest in an existing partnership not subject to s.86(1) as it could not be finally ascertained until the partnership was liquidated).
9. (1976) F.L.C. 90-142 (CCH), 75, 696.
10. For discussion of the presumption in question see *R.* v. *Reynhoudt* (1962) 36 A.L.J.R. 26, esp. *per* Dixon C.J., diss.
11. *Cf. Campbell* v. *Epping* [1970] Tas. S.R. 224 (Full Court).
12. (1976) F.L.C. 90-142 (CCH), 75, 696.
13. See *Duff* v. *Duff* (1977) F.L.C. 90-217 (CCH), discussed *infra*, p. 133.

appear to qualify not property but entitlement. They show that s.79 is intended to govern all property whether the entitlement is present or deferred to some prior interest.

In the event, the view of Hogan J. in *Komaromi's* case has not been followed. In *Nelson* v. *Nelson,* Goldstein J. said, in considering another application in regard to a Housing Commission home:

> "I cannot attribute to our legislature such short-sightedness as to limit the work 'property' as to mean corporeal property only and I am more persuaded to give this statute such construction as will make the statute work . . . The current English, by 'English' I mean 'English Australian', usage of the word 'property' includes in its meanings . . . such things as shares and choses in action and I do not exclude from 'property' as defined the interest parties have in a contract."[14]

This view has now been endorsed on appeal by the Full Court in *Duff* v. *Duff*.[15] In holding that shares were property for the purposes of s.79, the Full Court approved the definition of property used by Lord Langdale M.R. in *Jones* v. *Skinner*:[16]

> "Property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have."

The adoption of this view by the Full Court is, with respect, to be welcomed. Divorce nowadays is in large part about money and it is important that all the assets of the parties are brought before the court so that a fair and equitable adjustment may be made. Technical definitions of property should not limit the court's jurisdiction. Following *Duff's* case, the court now has jurisdiction over all types of property, whenever and howsoever received, and whether vested in possession or in interest,[17] and it is not possible for a spouse to avoid the jurisdiction of the court merely by converting his or her assets into a particular type of property. What is particularly refreshing about *Duff's* case, however, is the spirit animating their Honours' judgment. As the Full Court said:[18]

> "In our view the (Family Law) Act is to be read widely and liberally with words and expressions being given their ordinary meanings as far as possible and without undue restraint imposed by legal principles more apposite to social conditions markedly different from those which characterise society today."

And in reference to the Matrimonial Causes Act, 1959-1966, they added:[19]

> "While it is not without value to consider the case law which expounded, interpreted and developed the Matrimonial Causes Act 1959, this Act has been replaced by the Family Law Act 1975 and the very name of the new Act indicates the progressiveness of the concept and the broad principles which the legislation seeks to encompass."

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14. (1977) F.L.C. 90-205 (CCH).
15. (1977) F.L.C. 90-217 (CCH) (Watson, S. J. Murray and Wood JJ.).
16. (1835) 5 L.J. Ch. 90.
17. S.4(1) refers only to property in possession or reversion. It is inconceivable that this would not be construed to include property in remainder. Future interests in property of all kinds are clearly intended to be included.
18. (1976) F.L.C. (CCH) 90-217, 76, 132-133.
19. *Ibid.*

While *Duff's* case dealt with a recognised property right, the whole tenor of the judgment is that the court will make sure that the Family Law Act works. This leads one to speculate upon the fate of those who would use other devices to put their assets beyond the reach of the s.79 jurisdiction. For example a husband might seek to transfer his property to others before the s.79 application is made.[20] An obvious way to do this would be for the husband to transfer his assets to trustees to hold the assets on a discretionary trust with the husband as a beneficiary. The trustees hold the property; the party to the court proceedings holds merely a hope that the trustees will exercise their discretion one day in his favour. The argument is obvious. The beneficiary has merely a *spes*, a chance (if a very good one) that he will get some property, but at the time of the application under s.79 he has nothing of value. As long as he picks his trustees carefully, he is safe and will later enjoy his assets. The linch-pin of this argument is the definition of property. One escapes the court because one has nothing that can be defined as property. One has no vested interests.

It is submitted however that the court may not necessarily be defeated in this way. It is true that an expectancy behind a discretionary trust is neither a vested nor a contingent interest.[21] However an expectancy under such a trust is assignable in equity for value.[22] Moreover it is clear that a beneficiary has a right to compel due administration. Depending on the type of discretionary trust, this may be no more than a right to compel the trustees to consider whether to exercise their discretion, but it is an actionable right nevertheless, and therefore may be termed an equitable chose in action.[23] Whether or not one would wish to classify the expectancy under a discretionary trust as a property right for trust or taxation purposes, therefore,[24] one may be able to do so for the purposes of s.79 of the Act. The beneficiary does after all have some rights, and employing the liberality of construction advocated in *Duff's* case, it would require no straining of the word 'property' to regard the rights of a beneficiary under a discretionary trust as property rights for the purposes of s.79. There is no reason why definitions of property forged in other legal arenas should be dragged over into issues concerning the reallocation of the assets of a party to a marriage.[25]

If therefore it is possible to regard the rights of the beneficiary as 'property' for the purposes of s.79, what order is the court to make? Property or not, the interest of the beneficiary must probably be valued at nothing. The beneficiary has nothing until the trustees exercise their discretion in his favour. Even if the court were to look to the substance and not to the form, and order the husband to make a lump sum payment on the basis that the property in the trustees' name is in reality his, there is still no property out of which he can make the payment.

The answer however lies in the width of s.80 of the Family Law Act, 1975-1976. S.80 has been drafted with the obvious idea of giving the Family Court *carte blanche* in regard to the order they may make. The only limitation on s.80 is that the Court must be exercising powers under Part VIII of the Act—

20. If the husband seeks to reallocate his assets after the application is made but before it is heard, the court may set aside his transactions: Family Law Act, 1975-1976 (Cth.), s.85.
21. See *Gartside* v. *Inland Revenue Commissioners* [1968] A.C. 533.
22. See *Re Coleman* (1888) 39 Ch.D. 443.
23. For a full discussion, see Hardingham and Baxt, *Discretionary Trusts* (1975), 121-129.
24. See *Re Goldsworthy* [1969] V.R. 843.
25. For an example of rules formed in the law of trusts not applied in a taxation context, see *Baker* v. *Archer-Shee* [1927] A.C. 844.

in our terms, under s.79. It has been argued that an interest under a discretionary trust is "property" for the purposes of s.79. What powers may be used here? Under s.80(d) the court may order that:

> "any necessary deed or interest be executed and that such document of title be produced or such other things be done as are necessary to enable an order to be carried out effectively . . ."[26]

It is submitted that the court, under s.80(d), may order the husband to enter into a contract or covenant with his wife to pay her an amount or percentage of all sums received as a result of the trustees' discretion. In order to ensure that such assets do become available, the trustees' discretion might then be taken care of under s.80(h), by which the court may make "any other order . . . which it thinks necessary to do justice." Such an order need not be limited to those who are party to the s.79 application. It may be directed to others concerned with the husband's property—in particular his trustees.[27] Under s.80(h) the court may order them to disgorge such an amount as may be necessary to secure a just and fair reallocation of property.[28] The valuation of the interest under the discretionary trust becomes irrelevant. S.80(h) might also be used by the Family Court to make an order that the husband transfer to his wife property which will come into his possession at a future date.

Although there is a necessary element of speculation here, the Family Law Act, 1975-1976 does contain broad powers for property adjustment. Liberally construed in the manner of *Duff's* case, the powers may be used to confound schemes designed to circumvent the jurisdiction of the court and to do justice to the parties to a broken marriage.

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26. If the party fails to execute such a document, an officer of the court may do so: Family Law Act, 1975-1976 (Cth.), s.84.
27. If the court is suspicious of the existing trustees, it may appoint others: Family Law Act, 1975-1976 (Cth.), s.80(e).
28. Note also Family Law Act, 1975-1976 (Cth.), s.44(3) and (4). The Family Court may grant leave to make an application out of time in cases of hardship. This discretion might be exercised in a case where the husband receives a substantial windfall from the trustees.

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