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SETTING ASIDE TRANSACTIONS AND ORDERS RELATING TO PROPERTY UNDER THE AUSTRALIAN FAMILY LAW ACT

Caught between the longing for love
And the struggle for the legal tender
Where the sirens sing and the church bells ring
And the junkman pounds his fender.[1]

Introduction

The Family Law Act 1975-1979[2] (Cth.) confers upon the Family Court certain powers which are consequential upon the court's powers to make orders in respect of property and maintenance under Part VIII of the Act. The purpose of this article is to examine the consequential powers contained in ss.79A (which deals with the setting aside of orders altering property interests which have been made under s.79[3] of the Act) and 85 of the Act (which deals with

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1. Jackson Browne, "The Pretender" (1976, Elektra/Asylum/Nonesuch Records) stanza three.
2. Hereinafter referred to as "the Act".
3. Section s.79 reads as follows:

Section 79 Alteration of Property Interests

79(1) [Orders] 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, including an order for a settlement of property in substitution for any interests in the property and including an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage, such settlement or transfer of property as the court determines.

79(2) [Just and equitable requirement] 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.

79(3) (Omitted by No. 63 of 1976, s.25)

79(4) [Matters to be considered] In considering what order should be made under this section the court shall take into account —

(a) the financial contribution made directly or indirectly by or on behalf of a party or a child to the acquisition, conservation or improvement of the property, or otherwise in relation to the property;
(b) the contribution made directly or indirectly to the acquisition conservation or improvement of the property by either party, including any contribution made in the capacity of homemaker or parent;
(c) the effect of any proposed order upon the earning capacity of either party;
(d) the matters referred to in sub-section 75(2) so far as they are relevant; and
(e) any other order made under this Act affecting a party.

Section 79 incorporates sub-s. 75(2) which lists the criteria to be taken into account in a maintenance application. The subsection states:

75(2) [Matters] The matters to be so taken into account are —

(a) the age and state of health of each of the parties;
(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
(c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years;
(d) the financial needs and obligations of each of the parties;
(e) the responsibilities of either party to support any other person;
(f) the eligibility of either party for a pension, allowance or benefit under any law of the Commonwealth or of a State or Territory or under any superannuation fund or scheme, or the rate of any such pension, allowance or benefit being paid to either party;
(g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;
(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;

transactions made to defeat claims). The two sections under consideration assume significance in the absence of any general power under the Act to vary, cancel or discharge property orders. The absence of such a general power reflects a tendency in modern matrimonial property legislation towards finality in property orders[4] but, while s.85 corresponds with broadly similar legislation in the United Kingdom and New Zealand directed towards the protection of the subject matter of a property order,[5] s.79A of the Act is unique in its specific provision for a remedy for procedural injustice in the grant of a property order. Notwithstanding dissimilarities of direction, the sections may be regarded as similar in their capacity to affect the subject matter and the resolution of matrimonial property litigation.

Although the bare presence of these sections in the Act requires little explanation — primarily they exist to cope with the protean shape of interspousal perfidy — their particular existence, operation and effectiveness demand further inquiry. With regard to the particular existence of these sections it will be demonstrated that, while many of the difficulties surrounding s.85 are referable to the *form* of that section, the major difficulty concerning s.79A is not formal but *philosophical* and stems from a clash between retrospective (the "property approach") and prospective (the "support approach") constructions of the regulation of financial and property arrangements between husband and wife subsequent to dissolution of marriage. Specifically, s.79(4) contains retrospective (s.79(4)(a) and (b)) and prospective (s.79(4)(c), (d) and (e)) criteria.[6] The resultant conflation of property and maintenance components in lump sum orders impinges upon the operation of s.79A which is solely concerned with the setting aside of orders altering *property* interests.

Considerations of operation and effect flow from the paucity of case law on these sections and give rise to a number of questions. Are these sections largely symbolic? Do they basically perform a deterrent function acting (in the case of s.85, for example) as a statutory scarecrow to the disponor spouse? One might disingenuously inquire whether the low incidence of case law reflects the retention of an innate sense of fair play in the estranged Australian spouse when confronted with the potentially Draconian economic effects of reallocation of property pursuant to s.79 of the Act. Does the answer lie elsewhere in a high standard of professional ethics or, alternatively, in professional unawareness of the drafting techniques required to give the court power to make, for example, a s.85 order?[7] Or does the true answer lie in a judicial reluctance to invoke

3. *Contd.*

   (j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;
   (k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;
   (l) the need to protect the position of a woman who wishes only to continue her role as a wife and mother;
   (m) if the party whose maintenance is under consideration is cohabiting with another person — the financial circumstances relating to the cohabitation;
   (n) the terms of any order made or proposed to be made under section 79 in relation to the property of the parties; and
   (o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

4. See *infra,* n. 26 and Cretney's comments on the Matrimonial Causes Act, 1973 (U.K.) in Cretney, *Principles of Family Law* (2nd ed., Sweet & Maxwell, 1976) 212.
5. See, *e.g.,* Matrimonial Causes Act, 1973 (U.K.), s.37, ; Matrimonial Property Act, 1976 (N.Z.) ss.43-45.
6. *Supra,* n. 3.
7. See, *e.g., In the Marriage of Page* (1978) F.L.C. (CCH) 90-525 and *In the Marriage of Rickie* (1979) F.L.C. (CCH) 90-262. See, further, the remarks of Nygh J. in *In the Marriage of Whitaker* (1980) F.L.C. (CCH) 90-813 at 75, 128.

these sections or to interfere with third party rights? Subsequent discussion will attempt to explain these and related questions.

Section 79A of the Act

Section 79A of the Act has its analogues in s.75 of the Matrimonial Causes Act 1959-1966 (Cth.) and s.58 of the present Act. The former section provided:

> Where a decree nisi has been made but has not become absolute, the court by which the decree was made may, on the application of a party to the proceedings, if it is satisfied that there has been a miscarriage of justice by reason of fraud, perjury, suppression of evidence or any other circumstance, rescind the decree and, if it thinks fit, order that the proceedings be reheard.

Initially, the present Act contained no provision enabling the court to set aside orders altering property interests. Section 79A, in its original form, was inserted by s.26 of the Family Law Amendment Act (No. 1) 1976 and read as follows:

> (1) Where, on application by a person affected by an order made by a court under section 79, the court is satisfied that the order was obtained by fraud, by duress, by the giving of false evidence or by the suppression of evidence, the court may, in its discretion set aside the order ...

This version of s.79A contained no reference to a "miscarriage of justice" or "any other circumstance". The omission of these words, which would have greatly widened the scope of s.79A, was unfortunate because, save for an order under s.79A, property orders under s.79 are incapable of variation. Unless an aggrieved party could found an application upon one or more of the four criteria contained in the original s.79A he or she was bereft of a remedy. The catalyst of change was the decision of the majority of the Full Court of the Family Court in *In the Marriage of Taylor.*[8]

Taylor's Case

There is a black humour in *Taylor's Case.* The fact pattern resembles a Shakesperian comedy peopled with Dogberry-like lawyers, luckless protagonists and a fickle Dame Fortune. The story begins, appropriately enough, in the cruel month of April 1975, when the wife petitioned for dissolution of marriage on the grounds of cruelty. She also sought an order that the husband transfer his interest in the jointly owned matrimonial home to her. The wife's documents were served on the husband who immediately contacted his solicitors. He gave them detailed instructions denying the allegations contained in the petition and opposing the various orders sought by the wife. Unfortunately for Mr. Taylor his solicitors were somewhat lax at this early stage in the case.

No one appeared for the husband on the first return date despite his instructions to the contrary. Although an answer and cross-petition were eventually prepared, the husband's solicitors failed to file the answer in time. Then they failed to seek leave to serve the answer out of time. On 5 August 1975 Woodward J. heard the wife's petition in the Supreme Court of New South Wales. The court file on that day disclosed no appearance for the husband or, indeed, any document to indicate the husband's opposition to the orders sought by the wife.

8. (1977) F.L.C. (CCH) 90-226.

Woodward J. dealt with the wife's petition on an undefended basis. He ordered a decree nisi of dissolution of marriage and, *inter alia,* ordered the husband to transfer his interest in the matrimonial home to the wife. Seven days later the decree nisi became absolute. Mr. Taylor knew nothing about it. Then a friend of Mr. Taylor, quite by chance it seems, saw Mr. Taylor's name in a court list. Mr. Taylor again contacted his solicitors. An application to rescind the decree nisi was lodged but by this time the decree had become absolute. Nothing further was done by the husband's solicitors until 31 March 1976.

In the interim the Gods decided to intervene on the side of the hapless Mr. Taylor. For some unknown reason the wife's solicitors had not proceeded with the transfer. Thus when Mr. Taylor applied to the Family Court for sale and equal division of the proceeds the matrimonial home remained in joint names. The husband's application came on for hearing before Hogan J. on 2 July 1976. On this occasion the wife did not appear nor was she represented at the hearing because the wife's solicitors thought that the husband's application was to be heard in the Supreme Court. Hogan J. apparently assumed that the application was uncontested and made orders in favour of the husband.

The wife appealed to the Full Court of the Family Court from the decision of Hogan J. The majority (Asche S.J. and Dovey J.) interpreted "the giving of false evidence" as meaning evidence which was "wilfully false" or "demonstrably false" and decided against the husband holding that no such evidence had been given on the facts. The majority was not unmoved by Mr. Taylor's plight and commented:

> That the husband may leave this Court with a deep sense of...injustice, is a matter of the greatest regret to us. That the grievous mismanagement of his case in its earlier stages has brought this result is a matter of deep concern.[9]

The concern of the majority manifested itself in a plea for the amendment of s.79A. Their Honours stated:

> ...it must be obvious that cases will arise where a party has for any of a number of reasons failed to be present when property orders have been made...The drastic nature of a property order and, as we have found, its insusceptibility to variation must underline the necessity for a right to a rehearing not on the limited grounds contemplated by sec. 79A but on far broader principles of justice and equity. We call attention to the fact that sec. 75 of the *Matrimonial Causes Act* included the phrase "or any other circumstance" after the words "fraud, perjury or suppression of evidence" and that the same phrase is used in sec. 58 of the *Family Law Act* which, however is of limited use where the period between decree nisi and decree absolute is one month. The phrase "or any other circumstance" in this context has been interpreted to allow a party who through mistake, explicable misfortune or misapprehension of circumstances has been denied the right to put issues which he or she properly wished to raise, to re-open the case and put forward those issues... It is our hope that consideration should be given to amending sec. 79A in this fashion.[10]

The sentiments of the majority resulted in a recommendation by the Family Law Council to the Attorney-General that s.79A be amended by insertion after

9. *Id.,* 76-198.
10. *Ibid.* Their Honours cited *Byrne* v. *Byrne* (1965) 7 F.L.R. 342; *Gilpin* v. *Gilpin* (1969) 17 F.L.R. 131 and *McKenna* v. McKenna (1971) 18 F.L.R. 15.

the words "suppression of evidence" of the phrase "or any other circumstances leading to a miscarriage of justice". In the result, however, the amendment made by s.13 of the Family Law Amendment Act 1979 followed the formula contained in s.75 of the repealed Act and s.58 of the present Act. Section 79A now reads:

> (1) Where, on application by a person affected by an order made by a Court under section 79, the court is satisfied that there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance, the court may, in its discretion, set aside the order...

It is important to stress the fact that Mr. Taylor's appeal went to the Full High Court of Australia *before* the enactment of the present s.79A.[11] The High Court was therefore unable to rely upon the criterion of a "miscarriage of justice by reason of...any other circumstance". The basis of the decision of the High Court in *Taylor* is that any court, whether superior or inferior is subject to the rules of natural justice and that an order made in contravention of those rules may be set aside. In *Taylor* the High Court held that the Family Court could set aside orders where both parties to the dispute have not been heard. Accordingly the High Court made orders setting aside the previous orders and ordered a rehearing of the wife's application for a transfer to her by the husband of his interest in the matrimonial home. Despite minor differences in utterance, it is submitted that all members of the High Court reached this conclusion by an application of one of the cardinal rules of natural justice, the *audi alteram partem* rule. Gibbs J. (Stephen J. concurring) and Mason J. relied upon the decision of the High Court in *Cameron v. Cole*[12] in their judgments. There Rich J. had stated:

> "It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case...a court which finds that it has been led to purport to determine a matter in which there has been a failure to observe the principle has inherent jurisdiction to set its determination aside...the setting aside of the invalid determination lays the ghost of the simulacrum of a trial, and leaves the field open for a real trial...in the absence of clear words, a statue should not be treated as depriving a court of the inherent jurisdiction possessed by every court to ensure that trials before it are conducted in accordance with the principles of natural justice.[13]

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11. (1979) F.L.C. (CCH) 90-674.
12. (1944) 68 C.L.R. 571.
13. *Id.*, 589. Note the use of the phrase "inherent jurisdiction" in this passage and throughout the decision. It is important to stress that the decision of the High Court in *Taylor* is based upon an application of the rules of natural justice and not on the basis that the Family Court is a superior court of record with inherent jurisdiction. In *Taylor* Gibbs J. stated (*supra,* n. 11 at 78, 591):

    > It is clear that ... a court, whether superior or inferior, has inherent power to set aside an order made against a person who did not have a reasonable opportunity to appear and present his case. It seems immaterial in the present case whether the Family Court is regarded as a superior court or an inferior court.

    As to whether or not the Family Court possesses the inherent jurisdiction of a superior court of record, note that this question is undecided although an *obiter dictum* of Emery J. in *In the Marriage of Vergis* (1977) F.L.C. (CCH) 90-275 at 76, 470 supports the negative view. If the Family Court has the inherent jurisdiction of a superior court of record then that jurisdiction will extend beyond the rules of natural justice. For present purposes a sharp distinction should be made between the inherent jurisdiction of a superior court of record and the rules of natural justice. As to the former, see *Halsbury's Laws of England* (4th ed.) Vol. 10 para. 713; as to the latter, see De Smith, *Judicial Review of Administrative Action* (3rd ed., 1973) 134ff.

The recent amendment of s.79A raises a further question. Is there now any effective distinction between an application of the rules of natural justice and an application of the new criterion of a "miscarriage of justice by reason of...any other circumstance" in s.79A in the context of *property* disputes? Clearly the rules of natural justice apply whenever the Family Court decides upon a matter within its jurisdiction. The new criterion in s.79A applies solely to property orders. But the rules of natural justice are concerned with *procedural* irregularities whilst the case law on the requirement of a "miscarriage of justice" suggests that the phrase *may* extend beyond procedural injustice to situations where an unjust *result*[14] has been achieved or where there has been a *lack of jurisdiction.*[15]

Guides to the interpretation of the present s.79A may be found in s.58 of the Act and s.75 of the repealed Act and the case law thereon. An extensive discussion of the law on the various criteria governing the setting aside of orders altering property interests can be found in *Australian Family Law and Practice.*[16] There is little difficulty in establishing the meaning of the various criteria of fraud, duress, the giving of false evidence and the suppression of evidence.[17] *Prima facie* this is not enough; there must also be a "miscarriage of justice". This phrase was considered in *Wilson v. Wilson*[18] a decision of the New South Wales Court of Appeal on s.75 of the repealed Act. Asprey J.A. (Wallace P. concurring) quoted with approval the opinion of Viscount Dunedin in *Robins v. National Trust Co.*[19] Viscount Dunedin had stated:

> A miscarriage of justice...means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all...[20]

Wallace P. considered that this was not an exhaustive test. Asprey J.A. thought that the essential question to be determined was whether or not "something had occurred on the hearing which materially vitiated the judicial determination of the suit".[21]

The circumstances constituting a "miscarriage of justice" appear to be limitless[22] but the case law on the point typically involves the non-appearance of a party at a hearing.[23] In truth, what is being argued in such cases is that there has been a breach of the *audi alteram partem* rule, one of the cardinal rules of natural justice. It therefore follows that reliance upon the rules of natural justice in the context of s.79A is no longer necessary since circumstances involving a breach of the rules of natural justice will also amount to a "miscarriage of justice by reason of...any other circumstance". On the other hand it may be predicted that reliance upon the rules of natural justice in other contexts (for example, custody disputes) will assume importance.

It is tempting to view the sad progress of *Taylor's case* through four courts and the recent amendment of s.79A as merely a paradigm of bad drafting, bad effects, judicial pleas for reform, an eventual Lord Denning-like dispensing of

14. See *Byrne, supra,* n. 10, 345-346 per Selby J. In *Williamson v. Williamson* (1974) 24 F.L.R. 226, 229 Bray C.J. declined to follow *Byrne* on this point.
15. See *In the Marriage of Spratley* (1977) F.L.C. (CCH) 90-414 at 77, 103, per Yuill J.
16. (CCH Australia Ltd.) Vol. 1 at 44-050ff.
17. *Ibid.*
18. (1967) 10 F.L.R. 203.
19. [1927] A.C. 515.
20. *Id.,* 517.
21. *Supra,* n. 18, 216.
22. See *McKenna, supra,* n. 10 and *Williamson, supra,* n. 14.
23. See the discussion of the case law in *Taylor, supra,* n. 11 at 78, 590-592 per Gibbs J.; 78, 592 per Stephen J.; 78, 596 per Mason J.; 78, 598 per Murphy J. and at 78, 599 per Aickin J.

justice and ultimate re-drafting – a legal version of the circular Wordsworthian poem which takes us back to where we started. But such a vision obscures a more fundamental question which relates directly to the question of the particular existence of this section; why should property orders under s.79 be incapable of alteration except in the circumstances listed in s.79A?

The Full Family Court made it clear in *Taylor* that orders altering property interests are only susceptible to alteration under s.79A and may not be altered under s.83. Clearly, there are arguments to be advanced in favour of the non-alteration of property orders under s.79A – there is a duty on the court to end financial relationships between the parties and, as the majority said in *Taylor*, there "must be a *finis litium*". On the other hand, jurisdiction concerning maintenance and property orders overlaps considerably. Thus s.79(4)(d) enjoins the court to take into account, "the matters referred to in subsection 75(2) so far as they are relevant...". Further it is apparently within the power of the court to order the transfer of a piece of property by way of maintenance.[24] It is therefore argued that the court should characterise the quantum of the maintenance component of a lump sum order affecting property in order to avoid subsequent problems of variability. This proposal only provides a partial answer to the problem.

Some clarification may be gained by viewing the question from teleological and philosophical perspectives. On a teleological view it could be said that some provision for the alteration of property orders is a useful safeguard for the litigant and that the Act should be altered accordingly. A more practical and immediate solution derives from the decision of the Full Family Court in *In the Marriage of Warnock*.[25] Counsel should thus ensure that a periodic maintenance order, even for a minor amount, is made at some stage of the proceedings thereby preserving the possibility of a subsequent application for variation of maintenance to an order for lump sum maintenance. The latter may well amount, in effect, to an order for alteration of property by a consequential order for security for the lump sum order by the transfer of real property under s.80(d).

From a philosophical perspective the answer lies in the policy of the Act. If one agrees with the thesis propounded by Gray[26] to the effect that the Act represents a severe restriction of the "support approach" and a correlative swing towards the "property approach" with its emphasis on termination of obligation then s.79A (but in particular s.81) further supports that policy. The internal tension within s.79, *viz.*, the existence of a retrospective property component and a prospective maintenance component thus becomes, at worst, a philosophical fudge or, at best, an unavoidable necessity. But if the policy of the Act can be circumvented by arranging matters so that like the wife in *Warnock* a subsequent variation of maintenance application in terms of a claim for lump sum maintenance can be filed then not only is the "property approach" eroded but also s.81 and, to a lesser extent, s.79 are partially deprived of meaning.

Philosophy aside, what is the essential difference between an order for lump sum maintenance secured by a consequential order for transfer of property under s.80(d) and an order pursuant to s.79 transferring the same property

24. See *Sanders* v. *Sanders* (1967) 116 C.L.R. 366.
25. (1979) F.L.C. (CCH) 90-726.
26. Gray, *Reallocation of Property on Divorce* (Professional Books, 1977), 308. See, generally, Bailey, "Principles of Property Distribution on Divorce – Compensation, Need or Community?" (1980) 54 *A.L.J.* 190-200.

apart from the fact that the former order is capable of alteration under s.83 and the latter (s.79A aside) is not? In practical terms the result is the same – someone has obtained a piece of real estate worth, for example, $30,000 which may be disposed of as he or she thinks fit. Neither the Full Family Court nor the High Court addressed themselves to this problem. Thus, although difficulties relating to the scope of s.79A have diminished since the 1979 amendment, the general question remains; should s.79 orders be susceptible of alteration otherwise than pursuant to s.79A?

Philosophically, s.79A and s.81 are explicable as manifestations of an overall policy thrust in the Act towards the "property approach" but further judicial articulation of the policy of the Act in this area is required. Such process of clarification involves scrutiny of at least three questions. First, what is the policy of the Act with regard to the resolution of property and financial disputes? Second, how is the tension within s.79(4) between the "property approach" and the "support approach" to be resolved? Third, if the policy of the Act is the "property approach" does the operation of the device found in *Warnock's Case* derogate from that policy?

It is submitted that the following explanation is the best view. First, on the basis of internal evidence within the Act the policy of the Act is the "property approach".[27] Second, the internal tension within s.79(4) should be resolved in favour of the "property approach". An immediate solution would require mandatory quantification of maintenance and property components in lump sum orders. More radically, it is suggested that the section should be amended by deleting all the prospective criteria contained in subsection 79(4) paragraphs (c), (d) and (e). On this proposal the present conflation of property and maintenance components in lump sum orders is expunged in the interests of conceptual purity and the policy of the Act is maintained by the resultant requirement of discrete maintenance and property orders. Finally, teleological devices should be eschewed as contrary to the policy of the Act. Insofar as *Warnock's Case* derogates from that policy it should be overruled.

Section 85 of the Act

Section 85 of the Act is modelled on s.120 of the repealed Act. The latter section read as follows:

> 120. Transactions intended to defeat claims –
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> (1) In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, if it is made or proposed to be made to defeat an existing or anticipated order in those proceedings for costs, damages, maintenance or the making or variation of a settlement.
>
> (2) The Court may order that any money or real or personal property dealt with by any such instrument or disposition may be taken in execution or charged with the payment of such sums for costs, damages or maintenance as the court directs, or that the proceedings of a sale shall be paid into court to abide its order.
>
> (3) The court shall have regard to the interests of, and shall make any order proper for the protection of, a *bona fide* purchaser or other person interested.

27. See ss.79, 79A and 81.

(4) A party or person acting in collusion with a party may be ordered to pay the costs of any other party or of a *bona fide* purchaser or other person interested of and incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.

(5) In this section, "disposition" includes a sale and a gift.

Section 85 gives the Family Court power to set aside transactions which defeat the claims of one party in proceedings under Part VIII of the Act. Section 85 provides as follows:

Sec. 85: Transactions to defeat claims –

(1) In proceedings under this Part, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings for costs, maintenance or the declaration of alteration of any interests in property which, irrespective of intention, is likely to defeat any such order.

(2) The court may order that any money or real or personal property dealt with by any such instrument or disposition may be taken in execution or charged with the payment of such sums for costs or maintenance as the court directs, or that the proceedings of a sale shall be paid into court to abide its order.

(3) The court shall have regard to the interest of, and shall make any order proper for the protection of, a *bona fide* purchaser or other person interested.

(4) A party or a person acting in collusion with a party may be ordered to pay the cost of any other party or of a *bona fide* purchaser or other person interested of and incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.

(5) In this section, "disposition" includes a sale and a gift.

The salient difference between the two sections is the presence of the words, "irrespective of intention" in sub-s.85(1). Section 85 thus imposes strict liability; s.120 contains a *mens rea* requirement. Both sections were designed to catch the disponor spouse – the disgruntled husband or wife who, for whatever reason, attempts to evade the powers of the court in maintenance or property proceedings. Some of the avoidance mechanisms available to the disponor spouse have been discussed elsewhere by the writer.[28] In the context of the present Act the course to be taken by the disponor spouse is straightforward – either party must so arrange his or her financial affairs in order that no "property" as defined in the Act remains in existence at the material time. An example is provided by the creation of a discretionary trust similar to the trust in *In re Manisty's Settlement.*[29]

It is useful to view s.85 in connection with the injunctive power contained in sub-s.114(1) of the Act. The Family Court has made extensive use of the injunctive power in sub-s.114(1) to restrain a party from disposing of property

28. Walker, "Matrimonial Property and the Disponor Spouse", (1979) 10 *Fed. L.R.* 1-24.
29. [1974] Ch. 17. Discussed in *supra,* n. 28 at 9-10.

so as to defeat a future claim under s.79 of the Act. It is quite plain that the Family Court is using its powers under sub-s.114(1) as a "holding device" in the interim period before an application under s.79 can be made.[30] A difficulty is that, strictly speaking, an injunction under sub-s.114(1) should only operate upon matrimonial property (whatever that may be) since sub-s.114(1) is based on the marriage power. In practice, however, the Family Court appears to be extending the ambit of sub-s.114(1) in order to catch non-matrimonial property.[31] In addition there are alternative remedies with may be used to defeat the activities of the disponor spouse, for example, the caveat against dealings.[32]

Against such a background, s.85 appears as a remedy of last resort. If an injunction under sub-s.114(1) or some alternative remedy is not obtained in time by one party can the same effect be achieved retrospectively by the use of s.85? Before discussing this question it is necessary to dispose of a jurisdictional point. Section 85 commences with the words, "In proceedings under this Part...". The reference is, of course, to proceedings under Part VIII of the Act *i.e.*, maintenance and property proceedings. An application for an injunction under sub-s.114(1) is, it will be recalled, an application under Part XIV of the Act. In other words, there must be a maintenance or property application before the Court before s.85 can be invoked. The absence of such an application was fatal in *Rickie* and in *Page*. A property application cannot be made in the pre-dissolution period.[33] On the other hand, a maintenance application constitutes a matrimonial cause and can be sought in the pre-dissolution period. The practical answer to the jurisdiction problem then, it is submitted, is to apply for *Tansell* or *Seiling*-type injunctions *and for maintenance* in order to attract jurisdiction under s.85.[34]

We may return now to the question of whether or not s.85 can be used retrospectively. The crucial question is whether s.85 applies only to transactions made *after* the institution of proceedings under Part VIII of the Act or whether it can also "claw-back" and catch transactions made *before* that time. The former "narrow" reading is based on a jurisdictional premise. The proposition is that the Family Court's powers under s.85 only come into existence when proceedings under Part VIII have been instituted (whether by application for maintenance or property orders) and, further, that they only apply to transactions made after that time. This proposition rests upon the following arguments; first, in the absence of express words in the legislation there is a presumption in favour of the narrow reading, and, secondly, sub-s.85(1) uses a present participle, the present and the future subjunctive tense — thus the emphasis is upon present and prospective transactions.

The outstanding difficulty arising from the narrow reading is that only those transactions made *after* the institution of proceedings under Part VIII will be caught. The disponor spouse who rearranges his affairs six months prior to the filing of an application would remain untouched. It is precisely this difficulty which might lead the Family Court to give s.85 a wide and liberal interpretation. Judicial interpretation of this sort would require reading into sub-s.85(1) a reference to past transactions. The words "which is made" in sub-s.85(1) would need to be regarded as synonomous with the words "has been made" thereby giving s.85 a retrospective effect.

30. See *In the Marriage of Tansell* (1977) F.L.C. (CCH) 90-280 and *In the Marriage of Seiling* (1979) F.L.C. (CCH) 90-627.
31. *Cf.*, In the *Marriage of Mills* (1976) 11 A.L.R. 569 and *In the Marriage of Mazein* (1976) F.L.C. (CCH) 90-053.
32. See *supra*, n. 28 at 20-21.
33. *Russell* v. *Russell; Farrelly* v. *Farrelly* (1976) 9 A.L.R. 103.
34. There must, however, be some substance in the claim for maintenance. See *Whitaker, supra* n. 7 at 75, 128.

At present such judicial comment as exists has been in favour of giving s.85 a retrospective effect. In *Rickie*, Pawley S.J. considered *obiter* whether, if there had been an application under Part VIII of the Act, s.85 could operate retrospectively to catch transactions made before an application under Part VIII was filed. He cited, with apparent approval, two decisions on s.120 of the repealed Act.[35] In both *Hadley* and *Benjamin* it was held that transactions made before the institution of proceedings could be set aside. A decision of Bulley J. in the Family Court lends further support to this interpretation. In *In the Marriage of Ivanfy*[36] the wife filed proceedings, *inter alia*, for maintenance and property settlement in August 1971. In dispute was a *bona fide* contract of sale of a house property made between the husband and the purchasers in July 1971. In the particular circumstances, Bulley J. rejected the wife's submission that the contract be set aside under sub-s.85(1). Significantly, Bulley J. considered that he had the power to set aside a contract made one month *before* the institution of proceedings for maintenance and property settlement. *Ivanfy* might thus be regarded as the harbinger of a wide reading of s.85.

The problem has been clarified by the recent decision in *Whitaker*. There the parties were divorced in 1974 under the repealed Act and the husband was ordered to pay maintenance in respect of the child of the marriage. In 1979 the maintenance order was suspended. In 1975 the husband executed a deed of trust transferring a block of flats to a company for the sum of $80,000. In 1976 the husband was declared bankrupt. In December 1979 the company executed a transfer of the flats to *bona fide* purchasers and this transfer was subsequently registered. The wife attacked the transactions.

Nygh J. held (following *Rickie* and *Page*) that the wife's application in 1979 for revival and increase of child maintenance instituted at the same time as her application to set aside the trust deed was sufficient to attract jurisdiction under s.85. The wife's application for maintenance was sufficiently substantial for Nygh J. to reject the husband's submission that the application was a sham. His Honour also considered, *obiter*, that the reference to "proceedings under this Part" in s.85 was wide enough to encompass proceedings under the repealed Act.

Although the wife had abandoned her application to have the trust deed set aside by the time the matter came before Nygh J., His Honour considered it useful to dilate on the point. He stated:

> Section 85(1) refers to a disposition which is made to defeat an existing or anticipated order or which, irrespective of intention, is likely to defeat any such order. This indicates that there must be some connection between the disposition and the defeat or likely defeat of the order. Section 85 is not a provision which enables a party long after the event to upset past transactions because the present funds or resources of the respondent turn out to be insufficient. Such an interpretation would mean that any transaction made at the time by the respondent could subsequently be set aside if at any future time the assets of the respondent were insufficient to meet the demands of an order. A more reasonable interpretation is that the disposition must be shown to have the direct effect or the likely direct effect of defeating an existing or anticipated order in the sense that if that disposition had not taken place

35. *Hadley* v. *Hadley* (1967) 10 F.L.R. 459 and *Benjamin* v. *Benjamin and Others* (1976) 11 A.L.R. 211.
36. (1978) F.L.C. (CCH) 90-512.

> the order would have been effective. Hence, if the order was, or would in any event have been, defeated by other supervening circumstances, it cannot be said that the order was defeated by the disposition or was at any time likely to have been defeated by it.[37]

Thus His Honour found that the maintenance order was not defeated by the property transfer but by the bankruptcy and supervening events which rendered the husband incapable of earning (the subsequent bankruptcy alone would not render s.85 inapplicable). According to Nygh J. the wife's 1979 maintenance application could not have been "anticipated" and, therefore, an argument that the transaction defeated the order for costs made in 1974 could not be sustained. Finally, the second disposition by the company was held to be immune from attack since the first transaction could not be set aside, because the company was not a party to the marriage and because, at the material time, the husband had no interest in the company.

The judgment in *Whitaker* indicates the necessary nexus between disposition and order – it must be the disposition alone which renders the order ineffective. The test further entrenches the wide reading of s.85 and provides a useful delimitation test based on causality. Thus the erection of a family taxation vehicle such as a family trust would usually be immune from attack provided (and this seems to be the practical point of general application) that there are in existence other assets or income sufficient to meet the relevant order.

Recapitulation and Conclusion

This analysis has attempted to elucidate certain formal, functional and philosophical difficulties surrounding ss.79A and 85 of the Act. Problems of form and function in relation to s.79A have diminished since the 1979 amendment; the general philosophical question remains. It was suggested that the policy reflected in s.79A should be further entrenched by amending s.79(4) so that only retrospective criteria are of relevance in the assessment of a property order. The implementation of this proposal would result in the disappearance of the conflation in lump sum orders of property and maintenance components. The present Janus-faced s.79 order (looking to the past and the future) is thereby replaced by discrete orders for property and maintenance. The policy thrust of the Act, the "property approach", is confirmed and the "support approach" confined to its proper ambit.

The philosophy and function of s.85 are plain; formal problems have become less obvious upon judicial interpretation. Subsequent to *Whitaker* it seems possible to assert that a wide reading of s.85 will be adopted by the Family Court – providing the causality criterion enunciated by Nygh J. is met the dispositions of the disponor spouse will be struck down. The position of third parties, and, in particular, further dispositions made by third parties (see, *e.g.*, the second transaction in *Whitaker*) will cause difficulties. One may predict some judicial reluctance to use s.85 where third party rights are involved and especially where indefeasible interests have been conferred. Analogues for amendment can be found in ss.42-45 of the Matrimonial Property Act, 1976 (N.Z.) and, in particular, in s.44 of that Act which contains extensive provisions to cope with dispositions to third parties.[38]

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37. *Whitaker, supra,* n. 7 at 75, 129.
38. See Fisher, *Matrimonial Property Act 1976,* (Wellington, 1977) 37-46 and 139-40 and Atkin, "The Survival of Fault in Contemporary Family Law in New Zealand", (1979) 10 *V.U.W.L.R.* 93, 197. See also *Fulton* v. *Johnson* [1977] 1 M.P.C. 88; *Barrar* v. *Barrar* [1978] 2 M.P.C. 6 and *Stevenson* v. *Stevenson* [1979] 2 M.P.C. 177.

I'm going to be a happy idiot
And struggle for the legal tender
Where the ads take aim and lay their claim
To the heart and soul of the spender
And believe in whatever may lie
In those things that money can buy
Thought true love could have been a contender
Are you there?
Say a prayer for the pretender
Who started out so young and strong
Only to surrender[39]

39. *Supra*, n. 1, stanza six.