OWNERSHIP OF THE MATRIMONIAL HOME IN VICTORIA

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In Victoria the law relating to the ownership of a matrimonial home is in a peculiar position. Irrespective of in whose name the legal title to the property is registered, the amended section 161(4)(b) of the Marriage Act 1958 contained in section 3 of Act No. 6924 of 1962 altered the position in the following terms:

> 161. (3) Subject to the next succeeding sub-section but notwithstanding any other Act or law to the contrary the Judge may make such order with respect to the title to or possession or disposition of the property in dispute (including any order for the sale of the property and the division of the proceeds of sale, or for the partition or division of the property) and as to the costs of and consequent on the application as he thinks fit and may direct any inquiry touching the matters in question to be made in such manner as he thinks fit.
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> (4) Upon the hearing of any application between husband and wife under this section—
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> (a) ...
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> (b) husband and wife shall, to the exclusion of any presumption of advancement or other presumption of law or equity, be presumed, in the absence of sufficient evidence of intention to the contrary and in the absence of any special circumstances which appear to the Judge to render it unjust so to do, to hold or to have held as joint tenants so much of any real property in question as consists of a dwelling and its curtilage (if any) which the Judge is satisfied was acquired by them or either of them at any time during or in contemplation of the marriage wholly or principally for occupation as their matrimonial home.

The position at law which existed prior to this amendment was thus altered and in one sense made retrospective[1] by this novel legislation.

The new sub-sections appear to be an heroic attempt by Parliament to avoid the consequences of the decisions in *Wirth v. Wirth*[2], and *Martin v. Martin*[3] to the effect that the legislation then in force did not authorize the court to depart from the general principle of law governing the proprietary rights of husband and wife and to substitute, as has been done by the Court of Appeal (*e.g. Rimmer v. Rimmer*[4]) a general discretionary power to do what appeared to be just and equitable[5].

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1 *Haskin v. Haskin* [1964] V.R. 37. Retrospective in the sense that it applies to a home purchased prior to enactment. See Little J., [1964] V.R. 37, 39.

2 (1956) 98 C.L.R. 228.

3 (1959) 33 AL.J.R. 362.

4 [1953] 1 Q.B. 63.

5 *Per* Dean J. in *Boykett v. Boykett* [1965] V.R. 422, 424.

Where the title to the home is registered in the joint names of husband and wife, in general the application of this legislation gives rise to no special problem of law[6]. In such a case, the position will usually be in equity, as well as in law, that a joint ownership was intended irrespective of the proportion of the purchase price contributed by the husband or wife. The question of intention is relevant in determining whether it was intended that there should be a gift to the other by the one providing the whole or larger portion of the purchase price of the amount necessary to constitute them equal owners of the interest in the property represented by that amount. The fact of the registration of the title in their joint names bore very strongly, if not always conclusively, on that question. When the husband was providing all or the larger amount, there was also the presumption of advancement to his wife which she could rely on, thus making it very difficult for either spouse to maintain successfully that the jointly registered legal title did not represent the position in equity also. Of course, the statutory presumption created by section 161(4) reinforces that result where proceedings are taken between the parties or otherwise arise between them concerning the home property, although where there is in fact already a joint tenancy of that property, the statutory presumption may not be needed.

It is the position where the title is registered in the name of one party only that may cause the difficulty, especially where that legal owner provided all or substantially all of the purchase price. It is this position with which the amending legislation is especially concerned. Without the 1962 enactment, the other party would be hard put in such circumstances to make out a claim that he or she had any equity in the land and dwelling house, and generally the legal position and position in equity would be the same. For reasons of social policy this situation was altered by the 1962 enactment so as to provide that here also, the position in equity was to be different. Notwithstanding that the title is registered solely in the name of the one who provided the purchase price, once section 161 of the Marriage Act applies, there will be presumption that both spouses hold or have held the dwelling and its curtilage as joint tenants. Thus the legislation creates a type of resulting or implied trust over the property whereby the legal title and interest is subject to a beneficial interest in favour of both spouses as joint tenants. This, of course, is subject to it being proved to the satisfaction of the Judge that it was acquired by the one who bought it at any time during or in contemplation of the marriage wholly or principally for occupation as the matrimonial home. Furthermore, it is a rebuttable presumption, which can be upset by sufficient evidence of intention to the contrary or any special circum-

6 For an example see *Boykett v. Boykett* (Supra).

stances which appear to the Judge to render it unjust to allow the presumption to be relied upon[7] This statutory embodiment of a broad equitable principle that equality is equity in relation to what is usually the main family asset incorporates a trend revealed by some English decisions[8] and possibly also draws in its evolution on the equitable presumption of advancement. Oddly, the statute goes further than presuming equality of ownership such as will result in equal division, and creates the joint tenancy, although this is readily severable so as to bring about an equal division of the proceeds of the sale of the home property.

But although this legislation is far reaching in its terms and in its social effect, there may be a substantial limitation on the scope of this statutory principle, resulting from the introductory words 'Upon the hearing of any application between husband and wife under this section'. They may restrict the application of the statutory presumption only to cases where an application is before the Court between a husband and wife under the section, with the result that unless and until any such application is made, the pre-existing position at law is the only operative one between the spouses. If this is so, then on the death of one spouse, it seems that proceedings could no longer be taken under section 161 or otherwise raised for decision 'between husband and wife in any other proceedings',[9] because the legislation is limited to questions 'between husband and wife' and neither that relationship nor that description is any longer applicable. On the foregoing assumptions, unless proceedings had been already taken, the surviving widow or widower's rights in law and equity to the matrimonial home would be governed by the pre-existing legal principles, and he or she would not have the benefit of the remedial legislation contained in the amended section 161. It should be noted that the application of the new statutory presumption is of particular importance to a surviving spouse, because it is one of joint tenancy rather than tenancy in common. It would therefore follow that, if the new statutory presumption could not be relied upon by a surviving spouse, the original legal position would prevail, usually with the result that the title registered solely in the deceased's name would pass to his or her personal representatives as part of his or her estate; on the other hand, if the new statutory presumption operated, the whole of the interest of the deceased would pass by survivorship to the widow or widower. There is no reported decision to the effect

7 As to 'intention to the contrary' and 'special circumstances', see *Haskin v. Haskin* [1964] V.R. 37; *Hogben v. Hogben* [1964] V.R. 468; *Moore v. Moore* [1965] V.R. 61; *Boykett v. Boykett* [1965] V.R. 422.

8 *E.g. Rimmer v. Rimmer* [1953] 1 Q.B. 63; *Cobb v. Cobb* [1955] 2 All E.R. 696; *Fribance v. Fribance* [1957] 1 All E.R. 357; *Macdonald v. Macdonald* [1957] 2 All E.R. 690.

9 See s. 161 (10).

that this result follows from the legislation, but it is submitted that on the proper construction of the legislation, it does. The result itself may have been intended by Parliament, but whether intended or not, it is obviously illogical, and once the social basis for the legislation is accepted, the limitation is demonstrably unfair and unjust.

The concern here is with the situation where the title is registered in the name of one party only, and no application is made to the Court under section 161 and the question does not otherwise arise between the husband and wife in any other proceedings. Assuming also that there are no peculiar features about the home ownership, in that there could be no sufficient evidence of intention to the contrary or special circumstances—in other words the type of situation that very frequently must arise—what is the position in equity at that stage? Does the registered proprietor own the whole equitable interest, subject only to a sort of contingent equitable interest in the other spouse? Or is the legal interest already subject to a one half equitable share vested in the other spouse?

The scheme of section 161 is first and foremost to provide a special procedure for dealing with 'any question between husband and wife as to the title to or possession of or disposition of property'. This is given by sub-section (1). Sub-section (2) is supplementary to the procedure created by sub-section (1). The third sub-section gives the Judge jurisdiction to make 'such order with respect to the title to or possession or disposition of the property in dispute . . . as he thinks fit', as well as empowering him to make certain special directions and deal with the question of costs. The jurisdiction granted by this sub-section is specifically made subject to the next succeeding sub-section but notwithstanding any Act or law to the contrary. As far as the matrimonial home is concerned, it is therefore necessary to read the jurisdiction created by sub-section (3) in the light of the specific rules or principles as to how the jurisdiction is to be exercised, as set out in the following sub-section. But section (3) may be of importance concerning the matrimonial home if sub-section (4) does not apply, as is illustrated by *Moore v. Moore*[10], where it was found by Smith J. on the facts of that case that the statutory presumption of joint ownership had been rebutted. It was then open to the Judge to determine the matter in the exercise of the discretion given to him by sub-section (3) unfettered by the other considerations.[11]

Sub-section (4) is by its terms specifically limited to arise only in the circumstances there referred to. The following elements appear to be contained in the opening words of the sub-section: first, there must be an application under the section; secondly, not only should the application have been initiated by the issue of a summons or

[10] [1965] V.R. 61.
[11] See also *Boykett v. Boykett* [1965] V.R. 422.

writ, but it is the 'hearing' of the application that causes the presumption to come into play; thirdly, the application which so comes on for hearing must be between husband and wife. 'Husband' and 'wife' are not defined in the Act. The general meaning of husband is a man joined to a woman by marriage, and is the correlative of wife, and likewise a wife may be defined as a woman joined to a man by marriage.[12] These nouns are in contradistinction to 'widow' or 'widower' which generally mean respectively a woman whose husband is dead and who has not married again, and a man whose wife is dead and who has not married again.[13] Having regard to the language of this sub-section it seems impossible to construe it so as to enable it to apply to a situation where one of the spouses had died. How could the surviving partner be said to be a 'husband' or 'wife' within the normal meaning of those words? How could there be an application by a husband or wife if the other party to the marriage was deceased and could not be served with the initiating process? How could there be a hearing of an application between a husband and wife when the correct description of the applicant is either widow or widower, and the other party is deceased? These rhetorical questions appear to demonstrate clearly that section 161 is restricted in its application to the situation where at the time of the hearing both spouses are living and are still a husband and wife, for the answers to the questions must all be to the effect that the words used do not permit of such a construction.

The opening words to this sub-section must be read with sub-section (10):

> Where any question which could have been raised for decision in proceedings under this section arises between husband and wife in any other proceedings the Judge shall decide the question as if the question had been raised for decision in proceedings under this section.

But the same problem arises where one of the spouses is dead. Could there arise in such circumstances 'any question', being one 'between husband and wife', and so arising 'in any other proceedings'? If these words are given their normal meaning the answer must surely be no.

That sub-section (3) is the vital one concerning the Court's jurisdiction over all family assets including the home is emphasized by sub-section 4(a) which sets out a direction as to the way in which the power so conferred is to be exercised. Questions of fact relating to the matrimonial home frequently arise in this regard: whether there was any common intention expressed by the husband and wife, in relation to its acquisition and ownership. This may be crucial, though

12 Shorter Oxford Dictionary *s.v.* 'husband'.
13 *Ibid. s.v.* 'widow'.

where the property is registered in joint names it would surely be difficult to prove a contrary intention as to the equitable ownership,[14] and of course if no steps were taken to set aside that legal position it would be given its full effect in law and equity. Where the property is registered in the name of one party only, it would frequently have been so registered by inadvertence to the legal consequences rather than with a definite specific intention of completely excluding the other party from any interest in it. Again, there must be many instances of the title to the matrimonial home having been so registered prior to the passing of the 1962 Act but where the parties have not really adverted to the question of joint ownership of the home, and have allowed the title to be registered in the name of one party without considering the ramifications of such a step. Sub-section (4)(a) would not apply if proceedings were brought on for hearing between a husband and wife under section 161 if there was no common intention at all.[15]

The substantive part of sub-section 161(4)(b) is the one which creates the presumption as to joint tenancy, providing that the initial requirements as outlined above are satisfied. But even so, it is not a presumption in relation to the matrimonial property itself, but one which arises between the parties towards that property because of their relationship as husband and wife. The sub-section does not by its terms appear to create a presumption concerning the dwelling and its curtilage once it has been acquired by the husband and wife or either of them at any time during or in the contemplation of the marriage wholly or principally for occupation as their matrimonial home. Rather, it is a presumption that the husband and wife shall, as between them in any appropriate proceedings, be presumed to hold that property as joint tenants, subject to the presumption being rebutted in the manner indicated by the sub-section. The crucial point is that the presumption arises on the hearing of the application in respect of the property because of the relationship of the parties—it does not commence and subsist during that relationship and thereafter as a sort of latent trust. So it is not the fact of the purchase of the property in a particular context, or the fact of marriage in a particular context, which creates the presumption of joint ownership of the matrimonial property nominally purchased in the name of one only, but it is in fact in the appropriate context of an application by a wife or husband against the other living partner to the marriage falling within the description of either 'wife' or 'husband' coming on for hearing that causes the presumption to come into play. Otherwise, it is non-existent, or at most contingent upon such an application being made and coming on for hearing.

[14] *Boykett v. Boykett*, *per* Dean J., [1965] V.R. 422, 425.
[15] *Hogben v. Hogben* [1964] V.R. 468, 474.

The remaining sub-sections all deal with procedural rather than substantive aspects. Sub-section (5)(a) gives the Judge certain powers to interfere with past transactions made to defeat an existing or anticipated order with respect to that property, which would include the matrimonial property. But this power is for the purpose of giving effect to any order made under this section. This again emphasizes that with the matrimonial home, the order is one which takes effect in law and equity when it is made and is not a declaration as to what the ownership has been in the past. Part (b) deals with the protection of a *bona fide* purchaser or other interested person. Sub-section (6) relating to appeals, and sub-section (7), with its possibly contradictory expressions as to the parties' rights 'to require' the application to be heard in private and the Judge's discretion so that he 'may' hear any such application in private,[16] are purely procedural. Subsections (8) and (9) are also procedural in content, the former being concerned with an application other than one by a husband and wife and being inapplicable to the question of the home ownership, and the latter concerning the right to bring the proceedings either by summons or action, and in either the Supreme or County Court.

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If the social policy contained in this legislation is to promote a concept of equality of ownership of the matrimonial home between the husband and wife irrespective of in whose name the title is registered, it appears to be patently illogical to limit its application to the situation where the parties to a marriage resort to litigation over the property, and proceed with the litigation to the stage of bringing it on for a hearing. Such a limitation would really promote marital disharmony by encouraging litigation between spouses, and thus run contrary to the whole underlying purpose of the legislation. For this reason it would seem that the scope of the legislation should be expanded. Furthermore, where the parties valued their friendship more than their ownership of the property, there will arise a serious injustice when the party in whose name the home is registered predeceases the other. The survivor at that point of time will not be entitled in law or in equity to ownership of the home or any interest in it.

The provisions of Part IV of the Administration and Probate Act 1958 do not always give the unregistered surviving spouse relief from this injustice. If the widow or widower does not receive the whole interest in the home under the deceased's will or on intestacy, these

16 Starke J. in an unreported case *Arnold v. Arnold* held that on the requirement of either party the court was bound to hear the case in private.

provisions do not automatically provide the remedy, even in a deserving case. In an application under this Family Provision legislation, there is initially the need for an applicant to satisfy the Court that it has jurisdiction to interfere with the distribution of the deceased's estate as affected by will or by the operation of the provisions of Division 6 of Part I of that Act or both. The applicant must show that the distribution of the deceased's estate will not, unless interfered with, make adequate provision for the proper maintenance and support of the deceased's widow, widower or children. In this context, the applicant widow or widower may otherwise have been well provided for, or at least adequately provided for, without receiving under such distribution the absolute ownership of the home, or even any interest in it at all. The survivor's own financial circumstances may also weigh heavily against the success of such an application and thus preclude him or her from obtaining what, but for the want of a sufficiently unhappy marriage or disruptive argument otherwise would have automatically become his or hers. In this connection, the still frequent devise by a testator of a life interest in the matrimonial home to his widow with a gift of the remainder to other persons can cause considerable difficulty. On the assumption that the testator owned the home by himself absolutely, such a provision is quite reasonable towards the widow, and if it is coupled with other provision in her favour, it can be impossible for her to demonstrate that adequate provision was not made for her proper maintenance and support. At the stage of an application under the Family Provisions, the applicant would necessarily be conceding that the home did form part of the deceased's estate, because otherwise the Court would have no jurisdiction to make any order under this part of that Act as to its distribution. But if the principle contained in section 161 is extended in its application to its logical limits, the home should not be so treated, and should be automatically transferred into the name of the survivor.

The provision in a will by a testator or testatrix giving a widow or widower respectively a life interest in the matrimonial home should really have no place at all in Victorian law, or at least be effective only in very rare situations. In the usual context of such a devise in a will, the home (being real property consisting of a dwelling house and its curtilage (if any)), would have been acquired by them or either of them wholly or principally for occupation as their matrimonial home. While the limits of special circumstances rendering it unjust to presume joint ownership are necessarily wide and vague, it would not be the normal or usual position. Thus the survivor should have had at most the right to the home absolutely by survivorship, and at least should have had a half interest in the home if the joint tenancy was severed. The deceased may have severed the joint interest,

or in consequence of such a disposition, it might be arguable that as a matter of social policy he should be treated as having severed it. But that at most would permit the creation of a life interest in a half interest only of the home property, the other half being vested in the survivor.

Ideally, where there is no intention to the contrary and there are no peculiar 'special circumstances' of the type referred to in section 161(4)(b), a home acquired by one or both of the spouses as their matrimonial home should now be registered in the joint names of the husband and wife. For a variety of reasons, this often has not been done, is not done, and will not be done. But it would seem to be a logical extension of the equitable principle now incorporated into the provisions of section 161 of the Marriage Act dealing with the matrimonial home that on its acquisition wholly or principally for occupation as the matrimonial home the home property should be presumed to be jointly owned by the spouses, in the absence of proof of any sufficient evidence of intention to the contrary or any special circumstances which appear to a Judge to render it unjust to do so. The presumption should arise irrespective of proceedings being taken or arising between the parties. On this basis, if the title to the matrimonial home is not registered in the names of both partners to the marriage, it should automatically be so registrable in pursuance of the statutory presumption from the name of one into their joint names on application by either spouse to the Registrar of Titles, supported by a statutory declaration to the effect that the property consists of a matrimonial home which was acquired by them or either of them at any time during or in contemplation of the marriage wholly or principally for occupation as their matrimonial home. The reservation that the presumption is not to apply where there is an 'intention to the contrary' or 'special circumstances' could be retained, and as at present the onus would be on the one wishing to set up such contrary intention or special circumstances. But it would then be necessary for the one wishing to oppose the automatic result of joint tenancy in law and equity to apply to the Court to stay the registration of the title into joint names, or at a later stage to seek a declaration as to a resulting trust in his or her favour. Furthermore, there should be no reason why this right to have the title registered in joint names should not be extended to enable a surviving spouse, who could have made such an application to the Registrar of Titles to obtain an interest in the property as joint tenant (in the absence of successful opposition from the other), from so applying after the death of the other party to have the interest to which he or she would have been entitled during their lives together with the *jus accrescendi*. This of course, would be subject to proof that the property in question consisted of a matrimonial home which was acquired by them or either

of them during or in contemplation of the marriage wholly or principally for occupation as their matrimonial home, and subject to the right of the deceased's personal representatives to prevent the application by applying to the Court and proving a 'contrary intention' or 'special circumstances'.

The adoption of the foregoing suggestion would broaden the scope of operation of the new Victorian legislation concerning the ownership of the matrimonial home, but it is submitted that there would be a more rational implementation of the social policy contained in the present legislation. It may incidentally afford some answer to obstacles and difficulties created by the Stamps Act for married persons who, when the law was different, had the matrimonial home registered in the name of one spouse, and who may now wish to bring the factual position (*i.e.* the registered proprietorship of the land comprised in the certificate of title) into line with what the legal position would be presumed to be if one sued the other over the ownership of the home; but understandably a number of married citizens of Victoria in this situation would not want to take such a step if it involved a choice of either sham litigation between the husband and wife or the payment of considerable stamp duty on the transfer.[17]

17 On some incidental aspects of a transfer into joint names in New South Wales and the payment of stamp duty, see Moore, 'Unity of Time in the Creation of Joint Tenancies' (1966) 40 *Australian Law Journal* 240.