The Law Commission

(LAW COM. NO. 175)

FAMILY LAW
MATRIMONIAL PROPERTY

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed*
7 December 1988

LONDON
HER MAJESTY'S STATIONERY OFFICE

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Honourable Mr Justice Beldam, *Chairman*

Mr Trevor M Aldridge

Mr Brian J Davenport, QC

Professor Julian Farrand

Professor Brenda Hoggett

The Secretary of the Law Commission is Mr Michael Collon and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2 BQ.

MATRIMONIAL PROPERTY

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THE LAW COMMISSION

Item XIX of the Second Programme

FAMILY LAW

MATRIMONIAL PROPERTY

To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain

PART I

INTRODUCTION

1.1 This report is submitted in the context of Item XIX of our Second Programme: family law. In 1984, the Scottish Law Commission published a Report,[1] which, among other things, made recommendations relating to the ownership of household goods and to the Married Women's Property Act 1964.[2] This Act provides that where a husband makes a housekeeping allowance to his wife, money derived from the allowance and property bought with that money belong to the husband and wife in equal shares. We decided that it would be timely if we too looked at the 1964 Act: it might at the very least be made to apply to allowances made by wives to their husbands, although this was not the only criticism which could be made.[3] Further, this criticism that the Act is unequal in its application[4] could also be made of the presumption of advancement. This is the principle whereby a transfer of property from a husband to a wife is presumed to be a gift (subject to evidence to the contrary) but a transfer from wife to husband is not. Additionally, so far as household goods were concerned, we took the view that, rather than looking at the ownership of household goods in isolation we should relate our study of the 1964 Act and the presumption of advancement to a more general examination of ownership of money and property within a marriage, including, of course, the ownership of household goods. Accordingly this Report makes recommendations which cover all these three areas. A draft Bill to implement our recommendations is set out at Appendix A.

The Working Paper

1.2 In 1985 we published a Working Paper,[5] which examined the background to and operation of the Married Women's Property Act 1964 and the presumption of advancement. The Paper put forward, for discussion, several possible approaches to reform. We are grateful to all those who commented on the Working Paper.[6] A second consultation paper[7] was sent to those who had commented on the Working Paper, and again we thank those who responded to this.[8]

Earlier work

1.3 The Commission has done a great deal of work over the last twenty years on the ownership of property during marriage.[9] In this Report we have drawn upon earlier work, on the consultations then undertaken and on the responses both favourable and unfavourable to previous Reports. In 1973 in the first Report[10] we made proposals for the introduction of a fixed

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[1] Family Law: Report on Matrimonial Property (1984), Scot. Law Com. No. 86. Their recommendations have been implemented in the Family Law (Scotland) Act 1985.

[2] The Act is set out at Appendix C.

[3] See para. 2.5 below.

[4] It does not apply to money derived from an allowance made by a wife to her husband.

[5] Transfer of Money between Spouses (1985), Working Paper No. 90.

[6] A list is contained at Appendix B.

[7] The paper is set out at Appendix D.

[8] In addition, the Institute for Fiscal Studies has published a Report on *Property and Marriage: An Integrated Approach* (1988). The proposals made there go far beyond the scope of this report. We have reviewed our policy but wish to maintain our recommendations for small improvements in the present law, which we hope may prove generally acceptable, without prejudice to more comprehensive change which might later be contemplated.

[9] Family Property Law (1971), Working Paper No. 42; First Report on Family Property: A New Approach (1973), Law Com. No. 52; Second Report on Family Property: Family Provision on Death (1974), Law Com. No. 61; Third Report on Family Property: the Matrimonial Home (1978), Law Com. No. 86; Property Law: The Implications of *Williams & Glyn's Bank Ltd.* v. *Boland* (1982), Law Com. No. 115.

[10] Law Com. No. 52.

principle of co-ownership of the matrimonial home under which, in the absence of agreement to the contrary, the matrimonial home should be shared equally between husband and wife.[11] This has been very widely supported in consultation and in a social survey preceding the report.[12] In the third report,[13] we made proposals to protect a spouse's use and enjoyment of household goods. In 1982 we were once again asked to consider the rights of the spouses in the matrimonial home[14] and, in doing so, reported that:

> "The case for equal co-ownership of the matrimonial home as a clear and fair allocation of matrimonial property remains in our view justifiable on its own merits."[15]

Today the scope of property commonly regarded as making up the family home is not confined simply to land, bricks and mortar, but refers to all the material possessions which enable a married couple to enjoy life together in their home.

Property ownership during marriage

1.4 There were two consistent themes running through all the Commission's earlier work. The first was the persistent observation that the present rules for determining the ownership of property during marriage were arbitrary, uncertain and unfair. The second was that the ownership of property while a marriage continues is important and that it is not right to consider marital property only in relation to what happens when a marriage ends. There are those who have said, and no doubt will continue to say, that since English law now provides for the discretionary re-allocation of property between spouses on various events, for example death or divorce,[16] the precise detail of the ownership of property during marriage does not matter. It has also been said that in their attitudes to, and arrangements for, ownership of their property, married couples vary so greatly that it is impossible to generalise about the way in which such property would or should be regarded. If the parties did give thought to the ownership of property which they acquired for their joint use and benefit, they would not do so on any consistent or common basis. We cannot, however, accept these arguments, for the following main reasons:

(i) To a partner who is the sole or main wage earner in the family, the present rules for determining ownership may seem as unimportant during the marriage as they are important when the marriage has broken down; to the partner who has no separate income, on the other hand, they may appear as unfair during the marriage as they do when it ends. Respondents to our Working Paper who represented the latter were unanimously of this view. As was said in the Third Report on Family Property, "it is a poor and incomplete kind of marital justice which is excluded from marriage relationships and allowed to operate only when those relationships end".[17]

(ii) It is a false dichotomy to split marriages into the happy and the unhappy, and to say that while the couple are happy, property ownership does not matter and that, if they are not, they will get divorced and that the court will reallocate the property. Most marriages do not end in divorce. There may be occasions during a marriage when knowledge of who owns what property is important to either or both spouses. We believe that a law which aims to reduce uncertainty and to reflect the intentions of both parties is more likely to further stability in the relationship of marriage than one which does not.

(iii) Although it is undoubtedly true that the attitude of the spouses to family property will vary enormously and will depend upon individual expectations, nevertheless the law already provides an extensive body of rules affecting the property rights of the spouses. Changes in the principles upon which these rules are based will not alter the fact that the law finds it necessary to make provision for such rules, which are just as much an intrusion into the private lives of the parties whether they are made by Parliament or by judges.

(iv) It is clear that in some cases property rights during marriage are important when

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[11] *Ibid.*, para. 61(a).

[12] J.E. Todd and L.M. Jones, *Matrimonial Property* (1972), found that 91% of husbands and 94% of wives agreed with the proposition that the matrimonial home and its contents should legally be jointly owned irrespective of who paid for it.

[13] Law Com. No. 86, Pt. IV.

[14] Law Com. No. 115.

[15] *Ibid.*, para. 112.

[16] Inheritance (Provision for Family and Dependents) Act 1975 and Matrimonial Causes Act 1973, s.24, respectively.

[17] Law Com. No. 86, para 0.11.

either spouse becomes bankrupt or dies. Even when the court has to reallocate property on divorce, rules which have become common knowledge and which clarify the ownership of property acquired for joint use and benefit during the marriage could provide a more satisfactory basis for reallocation and could reduce the arguments, acrimony and delay in reaching a settlement of property rights.

We are encouraged in our belief in the value of legislation in this area by the speedy enactment of the Scottish proposals. We also note that in many other countries special provision for the ownership of property during marriage is made.

Our approach in outline

1.5 Looking at the three areas we have identified as in need of reform, that is the Married Women's Property Act 1964, the presumption of advancement, and the ownership of household goods, we concluded that the problems stemmed from the way in which the present law treats the use of money within a marriage and the effect of transfers of property (including money) between the spouses. Although we might have sought separate solutions to the problem in each area, we believe that there is a common principle on which to base a solution to the problems in all three areas. Whilst it will be true that many couples rarely stop to consider questions of property ownership when they are starting out to provide a family home or whilst they are happily married, we consider that if they did the majority of them would expect that much of the property acquired during the marriage would be co-owned.[18] Moreover we believe that those who did not do so might well be persuaded to the same conclusion if all the considerations to which we refer in this paper were pointed out to them.

1.6 The important issue is therefore how to distinguish between property which would normally be regarded as the joint property of the spouses and property which would normally be regarded as the sole property of one of them. The principle adopted in this Report, which is discussed in detail in Part IV below, is that the distinction should be made by looking at the purposes for which the property was bought or the purposes for which it was transferred by one to the other. If it was bought or transferred for their joint use or benefit, it should usually belong to them jointly; if for the sole use or benefit of one, it should belong to that one. This principle should not, however, be applied where the person buying or transferring the property had a contrary intention which the other one knew about. The present freedom of husband and wife to decide which items of property are to be owned jointly and which individually would be maintained. The new rules would, of course, make it much more likely than not that property acquired for the purposes of their life together will be co-owned. They would also do much to cure the present uncertainties. While these rules could well be applied to all forms of property, we are not making any recommendation as to the ownership of land, for reasons explained in Part IV.

1.7 Many social changes have contributed to the general change of attitude towards the ownership of property acquired for joint benefit during marriage but so far there is no indication that existing principles of law can be applied to bring about a change which reflects the general expectation. This is not surprising because the problems we now face are a classic example of issues which were described by Lord Reid[19] as "matters which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy and on which laymen are as well able to decide as are lawyers." In such a case it is not appropriate to leave the courts to develop the law by adapting existing rules and proceedings on their view of what public policy should be. To do so would be, in Lord Reid's words, "to encroach on the province of Parliament" as well as "introducing a new conception into English law and not merely developing existing principles".[20] Accordingly we

[18] See para. 4.1 below.
[19] *Pettitt* v. *Pettitt* [1970] A.C. 777, 795.
[20] *Ibid.*, p.795.

believe that it is not satisfactory to leave the law to be developed on a case by case basis, giving rise to all the uncertainties which this course entails. Like the Scots, we consider that we should make recommendations for legislation.[21]

The scheme of the report

1.8 In the following three parts we examine briefly the existing law and its problems, outline some different approaches to reform and explain our recommendations in detail.

[21]One of the Commissioners, Mr. Davenport, disagrees: "I do not share the view of my colleagues that to give effect to the policy expressed in this report by enactment of the draft Bill in Appendix A would bring about an improvement in English Law. Some of my principal reasons are, in summary, as follows:-

(a) Apart from making technical changes to the Married Women's Property Act 1964, I am not persuaded that there is any real need for reform in that area of the law. The reform suggested is as likely to lead to matrimonial quarrelling as to matrimonial concord.

(b) Having regard to the almost infinite variety in relations between husbands and wives, the law should be very cautious before imposing any statutory regime of property rights upon them. The policy recommended in this report (which policy can be seen clearly in the draft Bill) is to provide a series of rules which are intended positively to lay down when property is to be jointly owned. These rules are, I consider, too inflexible to be applied satisfactorily to every marriage. Indeed, it is not difficult to think of situations where an application of the rules can lead to consequences which many might regard as unjust.

(c) Assumptions made about household goods, generally of limited value, cannot safely be extrapolated to motor vehicles or to securities (both of which are excluded from the Scottish Act). The title to both vehicles and securities is likely to pass from person to person and claims for damages for wrongful interference or conversion by a spouse who had not consented to the sale would seem an almost inevitable consequence of giving effect to the draft Bill. Indeed, the sale of "family" motor vehicles might become significantly more difficult, as might the sale of securities, unless special protection is given to *bona fide* purchasers."

PART II

THE PRESENT LAW

Co-ownership within marriage

2.1 In deciding who owns property acquired by the spouses during the marriage the law at present places great weight on who paid for the property. Superficially this may seem reasonable but two examples may serve to show how the results may not reflect the spouses' wishes.

(i) Husband and wife decide to buy a washing machine; one Saturday they look together at various makes and decide to discuss it over the weekend. They decide upon the make they want and on Monday, the husband, who happens to pass on his way to work a shop which has the particular machine in stock, goes and buys the machine. On sale, ownership of the machine passes to the husband.

(ii) A husband is paid in cash, and his wife receives a monthly salary cheque. Because of this, they use his money for rent, food and other day to day necessities, and her money for bills and larger purchases. Consequently all the furniture in the house belongs to her.

Further, the emphasis on who pays creates great disadvantages for a non-earning spouse, who, whatever other contributions he or she may be making to the couple's life together, is likely to end up owning very little of the property which both of them may well regard as "joint".

2.2 It might be thought that the couple could avoid these results by choosing co-ownership. However, co-ownership cannot arise simply because the parties intend to own property in this way. Intention alone is insufficient; there must be some act which is effective to create the co-ownership. There are five ways in which co-ownership might arise:

(i) Purchase out of joint funds. If the couple have pooled their money, either physically, or in a joint bank account, and they intend the account to be joint in equity as well as in law,[1] then property bought with that money will be co-owned.[2]

(ii) Transfer of legal title into joint names. This is quite difficult to do, and we suspect that in practice it virtually never happens.[3] Once property has been acquired by one spouse, it can only be transferred into joint names by using the appropriate formalities for that type of property. So far as chattels are concerned, there must either be a deed, or the intention to transfer plus delivery. However, delivery between spouses can be difficult to prove,[4] and delivery where one wishes to create co-ownership would be even more difficult to establish.

(iii) Contribution to purchase. If one spouse contributes financially, either directly or indirectly, to the purchase of property by the other, the property will become co-owned[5] if the contributing spouse is the wife (subject to evidence of an intention on her part to make a gift to her husband, in which case the property will be solely his). If the husband contributes towards a purchase by his wife, the presumption of advancement will operate so that the property is solely his wife's, subject to evidence of an intention that he should not make a gift to her.

(iv) Proprietary estoppel. Similar to, and in some cases indistinguishable from, co-ownership arising from a contribution is co-ownership arising from proprietary estoppel.[6] Where one spouse leads the other to believe that property is to be co-owned, co-ownership may arise if the other spouse takes some action which would otherwise be to his disadvantage in reliance on that belief.[7]

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[1] An account could be joint in law only if, for example, it was joint for convenience only and the person who provided the funds never intended the other joint owner to be able to share in it beneficially.

[2] But see *Re Bishop (decd.)* [1965] Ch.450, where purchase with money from a joint bank account gave rise to sole ownership.

[3] Except for land. The legal title to land can only be transferred by deed (s.52 Law of Property Act 1925) and by registration where the title is registered.

[4] *Re Cole* [1964] Ch.175.

[5] *Pettitt* v. *Pettitt* [1970] A.C.777, *Gissing* v. *Gissing* [1971] A.C.886.

[6] See, e.g. *Grant* v. *Edwards* [1986] Ch.638.

[7] The precise way in which the court may give effect to rights created by proprietary estoppel may vary, and it is by no means clear on what occasions a proprietary estoppel will arise.

(v) Declaration of trust. It is possible for one spouse to declare that he, or she, is holding property on trust for both spouses.[8] However the courts have long been reluctant to hold that someone has declared himself to be a trustee,[9] because of the burden this imposes. Unless he makes it explicit that that is what he intends to be, a mere expression of a wish that someone else should have an interest is not usually enough.

(vi) Married Women's Property Act 1964. The Act is set out in full in Appendix C., and does give rise to co-ownership, but only where an allowance is made by a husband to his wife.

2.3 It might also be suggested that the law of agency would produce co-ownership in cases where one spouse was in effect buying goods for them both. However, for this to happen, the husband would have to make a contract of sale with the shop on behalf of himself and his wife, thus rendering them both liable upon it, which is not what any of the parties intend. Alternatively, if he contracts personally with the shop, the property vests in him and does not pass to the wife until she pays him for the goods, which again is not what they intend.[10]

2.4 The very brief account set out above demonstrates, we think, that even when a married couple have thought about it and wish their property to be co-owned, creating co-ownership may present difficulties. In what we suspect is the more usual case, where the couple have not thought about it at all, but if asked would say that they *assumed* much of their property was co-owned, they would be wrong.

The Married Women's Property Act 1964

2.5 Quite apart from whether the existing law creates co-ownership where it is desirable to do so, the Married Women's Property Act 1964[11] has certain defects which were highlighted in the Working Paper. The most obvious is that it applies only where an allowance is made by a husband to a wife, and not vice versa. However we did make other criticisms of the Act as follows:

> "4.6 The phrase "expenses of the matrimonial home" is vague and made even more so by the addition of the words "or for similar purposes". This has given rise to the suggestion that mortgage payments may be an expense of the matrimonial home. This suggestion was rejected by Master Jacob in *Tymoszczuk* v. *Tymoszczuk*.[12] In this case the husband gave his wife all his earnings and she paid all the family expenses out of them, including the mortgage payments. She left him and claimed a share of the house. Master Jacob held that the mortgage payments were not an expense of the matrimonial home. In *Re John's Assignment Trusts*[13] the first matrimonial home had been bought in the husband's name with a deposit saved by the wife out of what her husband had allowed her during the first five years of marriage (when they had lived with his parents). The mortgage instalments were paid by the wife out of her wages and money given to her by her husband. That house was sold and another purchased in their joint names, legally and beneficially, paid for by the proceeds of sale of the first house and a mortgage advance. Those mortgage instalments were paid from the profits of a business owned by the wife. Goff J. held that the express trust must take effect. The wife had argued in the alternative that the 1964 Act gave her a half share. Goff J. doubted whether the Act could apply retrospectively but did say,
>
> > "I must not be taken as accepting the view that where section 1 does apply, moneys paid to discharge a mortgage on the marital home are not expenses of the matrimonial home or expenses for similar purposes within the section".[14]
>
> 4.7 How far does property acquired with money derived from the allowance extend? How would the Act affect a case like *Hoddinott* v. *Hoddinott*?[15] We would suggest that

[8] *Paul* v. *Constance* [1977] 1 W.L.R.527. A declaration of a trust of land will have to be evidenced in writing, s.53(1)(b) of the Law of Property Act 1925.

[9] *Jones* v. *Lock* [1865] L.R.1 Ch.App.25.

[10] F.M.B. Reynolds, *Bowstead on Agency* 15th ed., (1985), p.274.

[11] The Act is set out at Appendix C.

[12] (1964) 108 S.J. 676.

[13] [1970] 1 W.L.R.955.

[14] [1970] 1 W.L.R.955, 960.

[15] [1949] 2 K.B. 406. This was a case where the husband and wife were in the habit of using the savings from the housekeeping money to enter the football pools. A dispute arose as to the ownership of furniture bought with some winnings. The Court of Appeal held that Mrs. Hoddinott was not entitled to any share in the furniture.

"property acquired" is wide enough to cover, for example, winnings on the football pools. It must be intended to be wider than "property bought". Whether it would have given Mrs. Hoddinott a share of the winnings must depend on whether the stake money was "derived from" the allowance or a part of the allowance itself. Even if it was derived from the allowance, the Act might have been excluded by a tacit agreement to the contrary. In *Re Johns' Assignment Trusts*[16] and *Tymoszczuk* v. *Tymoszczuk*[17] the purpose for which money had been given to the wives was not considered. It is arguable that if the money had been given for the purpose of making mortgage repayments, the Act could not have applied to the houses purchased with it because they were bought not with money derived from the allowance but with the allowance itself. These problems illustrate the difficulty involved in the phrase "money derived from" an allowance. A woman might buy something with the allowance by paying for it in weekly instalments. Alternatively she might save a part of the allowance each week and then buy it. In the second case it has clearly been acquired with "money derived from" the allowance. Has it in the first? Or has it been bought with the allowance itself?

4.8 The money or property derived from the allowance is to be held in equal shares which means that the husband and wife hold it as tenants in common. Each spouse can therefore leave it in his or her will to anyone he or she chooses. If they were to hold as joint tenants, the automatic right of survivorship would apply so that the surviving spouse would take regardless of the terms of the deceased's spouse's will. It does not appear that either the Royal Commission or Baroness Summerskill[18] considered which would be the more appropriate form of interest, a matter which we will consider further below.[19]

4.9 The Act did not state whether it was to apply retrospectively, so that one does not know whether savings made before it came into force are affected by it or not. This may now be a matter of less practical importance."

Presumption of advancement

2.6 The presumption of advancement is an evidential rule which provides that where there is no evidence to the contrary, if a husband transfers property to his wife, he is presumed to intend a gift.[20] Without this presumption, the general rule would apply, which is that the law does not allow a gift to be effective unless there is evidence that a gift is what the donor intends. Thus a gratuitous transfer with no evidence of gift gives rise to a resulting trust so that the transferee holds the property on trust for the transferor. This is what happens when a wife transfers property to her husband, since there is then no presumption of advancement.[21] It is true to say that today a court would not require very strong evidence to find an intention to make a gift,[22] but the initial position is unequal, and as with the Married Women's Property Act, does not reflect the modern legislative approach of treating men and women equally.

Response to the working paper

2.7 In the working paper we sought views as to whether the present law was satisfactory or not. Most of those who responded were agreed that the Married Womens' Property Act 1964 should be made to apply equally to husband and wife. On the issue of whether the criticisms we had made demonstrated the need for further reform, opinions were sharply divided. Some considered that even if the present law was not entirely satisfactory, legislation as to the position during marriage was unnecessary. Others (and the majority of the non-legal respondents) were in favour of a considerable measure of reform.

Summary

2.8 The present law is unsatisfactory because its application may not result in co-ownership of property even when a married couple desire this. Actual ownership may be held to depend on factors which neither party considered significant at the time of acquisition. In its treatment of money allowances and gifts of property the law discriminates between husband and wife.

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[16][1970] 1 W.L.R. 955.

[17](1964) 108 S.J. 676.

[18]Baroness Summerskill introduced the Married Women's Savings Bill in 1963, which fell through lack of Parliamentary time, and was reintroduced, after considerable redrafting, as the Married Women's Property Bill. This was a government Bill and became the 1964 Act.

[19]Para. 4.17 (of the working paper). See now para. 4.14 of this report.

[20]e.g. *Silver* v. *Silver* [1958] 1 All ER 523 *per* Lord Evershed M.R.

[21]e.g. *Grzeczkowski* v. *Jedynska* (1971) 115 S.J. 126; *Heseltine* v. *Heseltine* [1971] 1 W.L.R. 342

[22]*Pettitt* v. *Pettitt* [1970] A.C. 777, 793 *per* Lord Reid.

PART III

POSSIBLE APPROACHES TO REFORM

The Scottish Solution

3.1 The Family Law (Scotland) Act 1985 provides, among other things, that there should be a presumption that households goods are owned in equal shares:

> "S.25. (1) If any question arises (whether during or after a marriage) as to the respective rights of ownership of the parties to a marriage in any household goods obtained in prospect of or during the marriage other than by gift or succession from a third party, it shall be presumed, unless the contrary is proved, that each has a right to an equal share in the goods in question.
>
> (2) For the purposes of subsection (1) above, the contrary shall not be treated as proved by reason only that while the parties were married and living together the goods in question were purchased from a third party by either party alone or by both in unequal shares.
>
> (3) In this section "household goods" means any goods (including decorative or ornamental goods) kept or used at any time during the marriage in any matrimonial home for the joint domestic purposes of the parties to the marriage, other than —
>
> (a) money or securities;
>
> (b) any motor car, caravan or other road vehicle;
>
> (c) any domestic animal."

The following section in effect amends the Married Women's Property Act 1964 by making it apply to money derived from an allowance made by either husband or wife.

> "S.26. If any question arises (whether during or after a marriage) as to the right of a party to a marriage to money derived from any allowance made by either party for their joint household expenses or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to each party in equal shares."

The Married Women's Property Act 1964 has been repealed for Scotland.

3.2 These sections provide an apparently simple solution in two of the areas with which this report is concerned. They do not, of course, deal with the presumption of advancement. As will be seen,[1] in the case of property acquired during the marriage, our principal recommendations achieve a result which is for all practical purposes the same as that achieved by the Scottish legislation although we have arrived at it by a different route. Why have we not adopted a similar approach? It should first be noted that in the Working Paper we did raise, admittedly very briefly,[2] the possibility of introducing a presumption of co-ownership of household goods and this attracted very little support. In English law the precise effect of a presumption and the extent of evidence necessary to rebut or to overcome it has been a cause of much controversy.[3] On one view of the law, a presumption is only of value in a case if there is no evidence at all of the fact to be presumed or if, after all the evidence has been given, the weight of the testimony is so evenly balanced that the trier of fact is unable to reach a decision without calling in aid the presumption. In any event, introducing a presumption does not produce the clarity supplied by a definite rule. The effect of the Scottish provision is not to create co-ownership but to say that one can presume certain property to be co-owned if it is not possible to prove its true ownership. The section then removes one of the most obvious ways of establishing its true ownership, by providing in subsection (2) that proof of who paid for the goods bought during marital cohabitation is not sufficient. If adopted in English law, this approach would leave us without any clear principle by which "true" ownership could be established. The Scottish provisions also distinguish between goods bought in prospect of marriage and those bought while the parties were living together during marriage. Our recommendations have always been confined to property acquired or transferred during marriage. Finally, there were other defects of the Married Women's Property Act 1964 which we think should be remedied. We have concluded, therefore, that the better solution for

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[1] Part IV below.

[2] Para. 6.1.

[3] See, e.g. E. M. Morgan, "Presumptions", (1937) 12 Wash.L.R.255; R. Cross and C. Tapper, *Cross on Evidence* 6th ed., (1985), p.132.

English law is to establish a more general principle upon which the ownership of such property should depend. We also believe that there is intrinsic value in doing so.

Community of Property

3.3 It was urged upon us by some of those who responded to the Working Paper that, rather than considering separate issues, we should be recommending the wholesale introduction of community of property during marriage whereby some or all of the property of a married couple is automatically co-owned, by virtue of their being married to one another. It should first be said that community of property might by thought to be an unnecessarily elaborate solution to the relatively small-scale problems with which this paper is concerned. However we think the suggestion that such a system be introduced is sufficiently important that rejecting it requires rather more detailed reasons.

3.4 Proposals for adopting a community system have been considered several times before in England and once in Scotland. Community of property was rejected by a majority of the Morton Commission in 1956,[4] by the English Law Commission in 1973[5] and by the Scottish Law Commission in 1984. The nearest it has ever come to acceptance by Parliament was the Second Reading given to Mr. Edward Bishop's Matrimonial Property Bill in 1969.[6] The Commission rejected a system of deferred community of property in 1973, and recommended instead statutory co-ownership of the matrimonial home.[7] This was because the majority of those who responded to the earlier working paper on matrimonial property[8] had rejected a community system. Most wanted the courts to have more discretion to reallocate property on divorce or on death than is compatible even with a deferred community system.[9]

3.5 As part of our re-examination of this topic, we have undertaken a certain amount of comparative work to see how different countries cope with the question of matrimonial property.[10] A detailed review would be out of place in this report but we have drawn certain conclusions from this work. In doing so we have been conscious of the difficulty inherent in drawing valid comparisons between countries whose social and economic circumstances vary widely. However, we have detected certain trends. Countries with full or partial community during marriage have found that the restrictions this places on individual freedom within the marriage are unacceptable, and have moved towards more independent management during marriage.[11] Countries with completely separate property have moved towards various forms of partial or deferred community, or virtually automatic sharing on divorce.[12] However, where such systems lead to equal division on termination, with little or no discretion to reallocate, significant evidence is emerging that this is producing unintended results in that important needs are remaining unsatisfied. There have been moves to suggest more discretion is needed.[13]

3.6 While we do not consider that defining property rights during marriage is irrelevant now that we have such extensive powers of discretionary reallocation on termination, nor that some form of community of property would necessarily be unjust, we still think that it would not be acceptable. All experience shows that a community system which does not permit independent management during marriage is unacceptable, hence the move in countries which have community of property towards more independent management and more deferred community. Even those of us who would support community of property recognise that there are circumstances in which it would be inappropriate. Because any scheme would have to allow contracting out in some circumstances, and it would presumably still be thought desirable to allow the courts to vary property rights on divorce, the scheme would necessarily be complex. In an area of the law which directly affects the majority of the population this

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[4]Royal Commission on Marriage and Divorce (Chairman: Baron Morton of Henryton) (1956), Cmd. 9678, paras. 650-653.

[5]Report on Matrimonial Property (1984), Scot. Law Com. No. 86, para. 3.2.

[6]*Hansard*, (H. C.), 24 January 1969, Vol. 776, col. 801.

[7]First Report on Family Property (1973), Law Com. No. 52 and see Third Report on Family Property (1977), Law Com. No. 86.

[8]Family Property Law (1971), Working Paper No. 42.

[9]First Report on Family Property (1973), Law Com. No. 52, paras. 46—60.

[10]For a comparative review of matrimonial property law, see M. Rheinstein and M. A. Glendon, *International Encyclopaedia of Comparative Law*, Vol. IV, Ch. 4 (1980).

[11]For example the French reforms of 1970 and the Belgian reforms of 1976.

[12]See, for example, the New Zealand Matrimonial Property Act 1976.

[13]For an account of the problems caused by equal sharing on divorce in California, see. L. J. Weitzman, *The Divorce Revolution* (1985).

would be a definite disadvantage. Our final reason for rejecting community of property is pragmatic. We see very little likelihood of any such complex scheme being brought into effect in the near future. Even if it commanded overwhelming support (which it would not) it would be difficult to obtain implementation of such a report. The history of the Commission's proposals for co-ownership of the matrimonial home illustrates the difficulties.[14] To those who would prefer to see community of property and reject our proposals for that reason, we would point out that our proposals are simple and straightforward enough for there to be a realistic possibility of implementation.

Our preferred solution

3.7 As we indicated in Part I our approach has been to try to establish a principle which can distinguish between property which a couple would, if they thought about it, wish to be jointly owned, and property which they would wish to be the sole property of one of them. The majority of those who responded to the working paper thought that there should be reform of the present law so that property rights would be more clearly defined and should reflect the wishes of the spouses. Among those who favoured reform, there was widespread acceptance of the principle suggested in the Working Paper that ownership of money made available by one spouse to the other and property bought with it should depend on the *purpose* for which it was transferred, so that property transferred for the joint purposes of the spouses would become jointly owned and property transferred for the purpose of one spouse only would belong to that spouse. The purposes in mind have throughout essentially been those of spouses living together, not those of spouses as partners in business. Accordingly there is no suggestion that the principle should extend to property transferred for business purposes.

3.8 However, although the principle discussed in the Working Paper would have applied to all types of property, it was limited to *transfers* between the spouses themselves. After full consideration of the responses, it appeared that that solution concentrated too much upon transfers between spouses (a result of the work beginning with an examination of the Married Women's Property Act 1964). We therefore circulated a further paper to those who had responded to the Working Paper,[15] in which we set out the difficulties we had discovered with the proposals in the Working Paper as follows:

> "1.1 The major reform suggested by the working paper was that, rather than co-ownership applying to savings from a housekeeping allowance as at present, all money transferred by one spouse to another for common purposes should be jointly owned. There was substantial support for this suggestion. However, the underlying objective of the reform was to produce co-ownership in all cases where there is good reason to suppose that this was what was in fact intended, or would have been if the parties had addressed their minds to it at the time, and to do so irrespective of whether the correct formalities for achieving this under the present law had been adopted. In the light of that objective, we now incline to the view that in one respect our provisional proposals may have been too wide, whereas in another they may have been too narrow. Accordingly, before reaching any final conclusions, we are seeking the views of those who responded to the Working Paper on some alternative solutions.
>
> 1.2 Our provisional proposals may have been too wide in that we considered that joint ownership should apply unless the spouses had both agreed otherwise. It was not our idea, nor would it command significant support, to impose joint ownership on the reluctant. To insist on a contrary agreement would do this, as the providing spouse would have to ask for an agreement and might be hesitant to ask or unaware of the need to do so. We therefore now envisage that joint ownership will not apply where either spouse can prove that he or she did not intend it. Usually, of course, it will be the providing spouse who will want to prove this but occasionally the other spouse may be unwilling to become a joint owner of the property or money concerned.
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> 1.3 We believe that this modification of our original proposals is essential if any

[14]The Third Report on Family Property (1978), Law Com. No. 86 was debated by the House of Lords (*Hansard* (H. L.), 18 July 1979, vol. 401, col. 1432). The Bill received a second reading (*Hansard* (H. L.), 12 February 1980, vol. 405, col. 112) but it was made clear that the Government was not prepared to make available the necessary Parliamentary time for the Bill to become law.

[15]The paper is set out at Appendix D.

significant widening of the scope of the Married Women's Property Act 1964 is to be acceptable. However, in respect of the savings from a house-keeping allowance which are now covered by that Act, the scope would be somewhat narrowed, as the Act at present requires a contrary agreement if co-ownership is not to arise. Hence views on this point may depend upon which of the solutions canvassed below is preferred.

1.4 Our original proposals may, however, have been too narrow in that they were confined to the transfer of money from one spouse to the other and to the purchase of property with that money. As we have said, there was substantial support for the proposition that money transferred for common purposes should (in the absence, as we now propose, of a contrary intention by the transferor) be jointly owned. However, we were anxious not to exclude couples who organise their finances for common purposes but do so without any transfer, e.g. where one pays for their accommodation while the other shops for food and cleaning materials. The concept of the "notional pool" had been developed by the courts as one means of identifying contributions to the purchase of a matrimonial home and seemed capable of application in this context too. Once again, there was considerable support for our suggestion that such circumstances should be covered.

1.5 One means of doing so would be to provide that where both parties spend money for common purposes, the whole shall be treated as jointly owned. On further consideration, however, this seems somewhat arbitrary in its operation. It would give rise to full joint ownership where one spouse had spent only a tiny amount on common purposes, while the other had spent a great deal, but not where one spouse had spent nothing at all. It would be difficult to identify a time-scale within which the expenditure of one spouse could or could not be treated as a contribution to the notional pool with the expenditure of the other. It would also be difficult to distinguish those who had operated their finances separately by choice, and with the intention of retaining individual ownership, and those who had operated separately by chance or for convenience but with the intention of pooling their resources.

1.6 The crux of the matter remains, in our view, not the way in which the parties have organised their finances, but the purposes to which that finance has been put. Consultation confirmed our impression that, in the united households with which we are concerned, a prima facie rule that money spent or set aside for common purposes results in joint ownership will in most cases produce the effect which the parties in fact intended, or would have intended if they had thought about it at the time (it is, of course, common for married couples to give no thought to legal ownership when acquiring property for their joint use or benefit). In combination with our present suggestion that the provider of the money should be able to show a contrary intention, therefore, such a rule would be just. Accordingly we are canvassing some alternative methods of this and some of the problems which these may entail."

3.9 We put forward our revised proposals as follows:

"2.1 The solution which we are at present inclined to prefer is that where money is paid by either spouse to the other or to buy property and the payment or purchase is for common purposes, the money or property will be jointly owned, subject to a contrary intention on the part of either spouse.

2.2 To expand a little, the purchase of property for common purposes would give rise to joint ownership, even though there had been no transfer of money to the other spouse and no expenditure on common purposes by the other spouse. This avoids the likely difficulties of the "notional pool". It might be thought that it would go too far and produce more joint ownership than is warranted. However, it would give way to a contrary intention which need not be communicated to the other spouse, so a spouse who wishes to retain sole ownership can do so. The main effect would be to produce co-ownership in household assets even though there was no thought given to it at the time and/or the formalities technically required for a transfer to the other spouse (such as delivery of goods or a declaration of trust) had not been complied with. It might be thought that this proposal alone is sufficient. However, it makes no provision for ownership of money that is not spent, and thus for the very savings with which that 1964 Act is concerned. Hence we would retain the idea of making money paid by one spouse to the other for common purposes into jointly owned money."

It was noticeable that views did not change. Those who favoured the wider reforms of the

working paper generally preferred the new proposals. Those who were against wider reform remained opposed to it. Other reforms (such as those in Scotland) were not supported by this group either.

3.10 Matrimonial property law is an area where it is notoriously difficult to obtain even a measure of agreement. There would probably be general agreement to a simple reform of the 1964 Act to make it apply to husbands and wives equally. However, such a reform would do nothing about the ownership of most household goods and would leave the presumption of advancement in its present unsatisfactory state. In the next Part we explain the reform outlined above in some detail. Its general effect will be to create co-ownership of much household property, and it is to that extent similar to the Scottish reforms, although it achieves the result by a different route. We are satisfied that over the last twenty years, there has been quite sufficient support shown for the general principle of *enabling* more matrimonial property to be co-owned to warrant us making this recommendation.

PART IV

DETAILS OF THE PROPOSED REFORM

Introduction

4.1 Money may be spent by spouses for many different purposes. However we believe that it is possible to distinguish two main purposes; first the use or benefit of the spouses jointly and, secondly, other uses or benefits. There is evidence to suggest that spouses regard much of their property as jointly owned even when in law it is probably not.[1] Dissatisfaction with the present law arguably stems from the fact that ownership of the money used and property acquired with it is quite unconnected with the purposes for which it is to be used. The policy of our reform is to create a direct connection between the purposes for which money is spent and its ownership. Accordingly our proposal has two main limbs:

(i) where money is spent to buy property, or property or money is transferred by one spouse to the other, for their joint use or benefit the property acquired or money transferred should be jointly owned.

(ii) where money or property is transferred by one spouse to the other for any other purpose, it should be owned by that other.

In both cases, the general rule should give way to a contrary intention on the part of the paying or transferring spouse, provided that the contrary intention is known to the other spouse.

The Nature of the Property

4.2 Our initial work in this area was largely concerned with the Married Women's Property Act 1964, and hence with transfer of money. Since we now propose that the purchase or transfer of personal property from one spouse to the other for their joint use and benefit should give rise to co-ownership, we have had to give more detailed consideration to the issue of what property should be affected by our proposals. The Scottish reforms affect household goods only and they specifically exclude among other things, land and cars. The principle upon which our proposals are based could apply to all types of property. However for the reasons we explain below, while not being as restricted as the Scottish Act, we have decided that two types of property should not be included in our proposal for joint ownership of property bought by one spouse for the use and benefit for them both. These are land and life insurance policies.

4.3 Our main reason for excluding land is that we believe that if we make a recommendation which has the effect of extending joint ownership of the matrimonial home, our basic principle will be seen to be controversial and may attract inappropriate opposition. The Commission recommended statutory co-ownership of the matrimonial home some years ago, and although the principle of co-ownership had been strongly supported on consultation, that recommendation has never been implemented. One objection to that earlier scheme was that it required a spouse who was not a legal owner to register her interest in order to achieve protection against third parties. Since then, the case of *Williams & Glyn's Bank Ltd.* v. *Boland*[2] has made it clear that a spouse with a interest in the home which is registered land does not have to register her interest to gain protection so long as she is in actual occupation. We have recently expressed our support for this approach.[3] Partly as a result of that case, it is understood that virtually all matrimonial homes are now purchased in joint names.[4] It is also true that the spouses are more likely to receive legal advice when purchasing their home than when purchasing other property. Thus further statutory intervention may not be needed.

4.4 Nevertheless, most of us would support the extension of the principle of this Bill to land. While such an extension, for the reason given above, would not have a major practical impact,

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[1] A survey published in 1972 found that the majority of spouses regarded much of their property as jointly owned, see J. E. Todd and L. M. Jones, *Matrimonial Property (1972)*, especially p.13. More recently a survey in Scotland found a similar preference for joint ownership, A. J. Manners and I. Rauta, *Family Property in Scotland, (1981)*, p.8

[2] [1981] A. C. 487.

[3] Property Law: Third Report on Land Registration (1987), Law Com. No. 158.

[4] In 1983 and 1984, the General Household Survey asked the question "in whose name is this property owned?" In 1983, 72% of married couples said they were joint owners, and in 1984, 76%. The GHS includes Scotland. Manners and Rauta, *Family Property in Scotland*, (1981) found 57% of married couples were joint owners, so the GHS result may understate the extent of joint ownership in England and Wales. Both Manners and Rauta, (1981) and Todd and Jones, *Matrimonial Property*, (1972) found that joint ownership was more likely the more recently the property had been purchased.

it would be of assistance in cases where, despite the parties regarding the home as joint, it is in one name only.[5] Excluding the matrimonial home may create a new and potentially serious anomaly, in that where one spouse pays for the matrimonial home and the other buys the furniture, the furniture will become jointly owned but the house will not. We recognise that this is more likely to prejudice women than men.

4.5 However, we accept that traditionally real property has been regarded as a subject of special difficulty and importance. It would be unfortunate if the proposals we are now considering, which could bring clarity and fairness to the ownership of personal property during marriage, were to be adversely affected by considerations peculiar to real property. Such a result would, we believe, leave English law seriously defective when compared with that of Scotland. On balance, therefore, we have excluded land and hence the matrimonial home from the Bill. It would, of course, be a simple matter to delete that exclusion if this were thought desirable.

4.6 We have also excluded life insurance polices from this recommendation for two reasons. Because policies often continue in existence for extended periods, they might remain jointly owned where this is inappropriate and there could be anomalies if land is excluded but endowment policies were to be included. To elaborate a little, it might be thought that each annual payment of a premium could be treated as a purchase of so much of the value of the policy as could be related to that premium. However, there is authority to the effect that the policy is puchased once and for all at the start and the payment of premiums cannot therefore be treated as separate purchases.[6] Thus if a policy was bought for the joint use or benefit of the spouses, the money that was paid out under it would be jointly owned even though it was paid out many years after the relationship ended and the premiums had subsequently been paid by one only. We recognise that the exclusion of life insurance policies may seem to create anomalies in the treatment of investments which couples may buy with their savings. Some regular savings plans are in the form of insurance policies, even though the underlying security is provided by assets such as unit trust units which can be purchased directly. This difference is not desirable, but it stems from the rules regulating investments and there seems to be no alternative here but to treat all insurance policies in the same way.

4.7 Although the provisions of the Family Law (Scotland) Act 1985 exclude securities and motor vehicles from the presumption of joint ownership, we were not convinced that such an exclusion could be justified. The reasons given by the Scottish Law Commission for not including cars, caravans and other road vehicles[7] were that in the case of cars they were less likely than ordinary household goods to be regarded as jointly owned and less likely to present difficulty in applying the ordinary law to determine ownership. As to the first of these reasons, we note that it is based on the fact that 90% of married informants considered furniture and other household goods to be jointly owned, whereas only 74% (in families where there was only one car) considered the car to be jointly owned. We have been unable to attach as great a significance to this statistical difference for it remains the fact that three-quarters of the informants regarded the car as jointly owned. The Scottish Law Commission also placed weight on the fact that for cars there is a registration book. However we attach little significance to this for in English law it has been held[8] that the registration book is not a document of title and registration may simply be a matter of convenience not intended in any way to reflect the interests of the parties in the property. Where a motor car, or indeed a caravan, is acquired for the use of the family and is wholly or mainly used for family purposes, we believe it would normally be regarded as belonging to both spouses. It would be wholly artificial to regard a family car purchased for the use of both spouses as belonging to one of them to be loaned to the other on each occasion that the other needed to use it. Consequently we can see no good reason for excluding the family car from our provisions.

4.8 In the case of securities, we have similar difficulty in singling them out where they are purchased wholly or mainly for the benefit of both parties. If the principle of co-ownership is regarded as fair and justifiable in its own right when applied to the matrimonial home, it would be illogical not to apply the same principle to securities acquired by spouses, for example during the early years of the marriage, with the object of providing for the down payment on a future matrimonial home. Similarly the parties may wish to invest savings in securities

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[5] e.g. *Midland Bank* v. *Dobson* [1986] 1 F. L. R. 171.
[6] *Re Harrison and Ingram, ex parte Whinney* [1900] 2 Q. B. 710.
[7] (1984) Scot. Law Com. No. 86, para. 4.4
[8] *Joblin* v. *Watkins & Roseveare (Motors)* Ltd. [1949] 1 All. E. R. 47.

pending expenditure on some other family project or simply for their joint benefit on a "rainy day".

4.9 Another difficulty which has been suggested in the case of both motor vehicles and securities is that it might make transfer of such property more difficult. We are unable to see that our proposals would add to the existing need for caution in purchasing either motor vehicles or securities. We consider in detail later[9] the effect which our recommendations might have on third parties and we believe that for the reasons there given the proposal to include motor cars and securities will not create any additional difficulty in their sale or transfer. Consequently we do not consider that valid reasons exist for excluding them.

4.10 The exclusion of land and insurance policies relates only to the proposal that *purchase* should be an occasion when co-ownership may arise. The proposals relating to transfer of property are not so restricted. The reason for this is that this aspect of our proposal is intended to deal with the problem of the presumption of advancement. That presumption applies already to all kinds of property, and hence any reform must do so as well.

Other exclusions

4.11 It is implicit in our recommendations that other property is also excluded. Since the proposals apply to purchases by a spouse or transfers by a spouse, anything owned before the marriage will necessarily be excluded. Likewise gifts or inheritances received by one spouse during the marriage are excluded, although the spouse who has received them may still make a transfer to the other spouse or to both of them jointly, in which case the new rules will apply. Most importantly, our proposals are designed for the property bought or transferred for the purposes of the couple's domestic life together. They will only apply to purchases and transfers taking place while the couple are living together in the same household. None of them will apply to transfers or purchases made wholly or mainly for the purposes of a business.[10]

Contrary Intention

4.12 As we made clear in our Working Paper, it was not suggested that a regime of property rights be imposed on married couples which deprived them of the freedom to make any arrangements they wish about the ownership of the property they acquire. Our aim is to give effect to the parties' expectations not to thwart them. Our concern is to provide a clear rule in the case of property which would normally be regarded as belonging equally to them both in cases in which they do not make specific arrangements between themselves. It is therefore essential that spouses should be able to reserve or transfer exclusive ownership in property, if that is their wish, with the minimum of formality. On the other hand such provision must not be so vague and uncertain as to undermine the aim of clarifying the ownership of the property concerned. We have considered six possible approaches:

(i) express agreement with some formality;

(ii) express agreement without formality;

(iii) implied agreement;

(iv) contrary intention notified to the other spouse;

(v) contrary intention known to the other spouse;

(vi) contrary intention not known to the other spouse.

The Married Women's Property Act 1964 requires a contrary agreement which presumably may be expressed or implied. In the working paper we suggested an agreement, express or implied. Some of those who commented on the working paper thought that only an express agreement, evidenced in writing, should be sufficient to displace joint ownership. It was suggested that anything less could create uncertainty. However, we received persuasive arguments against requiring an agreement. It was said that this would impose co-ownership, as the paying spouse would only be able to escape co-ownership if the agreement of the other spouse could be secured. In the end we found this argument to be convincing, and turned to considering the possibility of requiring a contrary intention.

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[9]See para. 4.16 below.
[10]See para. 3.7.

4.13 Again it was put to us forcefully that a contrary intention on its own could lead to unjust results, because both spouses might be spending money, one on the assumption the property purchased would be jointly owned, whilst the other had a secret contrary intention. It has to be said that this is not very likely as such a contrary intention could be hard to prove. However we do accept there is a possibility of injustice and we therefore recommend that to be effective to retain the whole proprietary interest in property acquired for the joint use or benefit such an intention by one spouse must be made known to the other at the time when the property is so acquired or transferred. We recognise that disputes concerning matrimonial property may take place many years after the purchase of the property and that proving a contrary intention may well be difficult, so that joint ownership is likely to be the norm. We believe this is the right result. It reflects most couples' assumptions about their property, while preserving the position of those who make it clear, though not necessarily in any formal way, that, as regards some or all of their property, they wish to retain sole ownership.[11] Moreover we have been unable to think of any likely circumstances in which our proposals would lead to a result which was contrary to the common intentions of the parties at the time of acquisition.

Joint ownership

4.14 We have been referring to joint ownership. It is necessary to consider whether the spouses should be joint tenants or tenants in common, and whether the joint ownership should be equitable only or both legal and equitable. The Married Women's Property Act 1964 creates a tenancy in common in property to which it applies. The major differences between the two forms of ownership are the right of survivorship and the fact that if the property is later divided between joint tenants, it is divided equally whereas a tenancy in common could mean unequal shares. If the couple are joint tenants, then the property passes automatically to the survivor on the death of one of them whereas if they are tenants in common, the property will pass under the will or according to the rules of intestacy. We recommend that joint tenancy is the appropriate form of ownership, but again subject to a contrary intention known to the other spouse.

4.15 In considering whether the ownership should be equitable only, or legal and equitable, we have tried to achieve a simple solution without the introduction of trusts (which co-ownership in equity only will necessarily involve) except where absolutely necessary. Legal title to some forms of property can only be conferred in certain ways. Legal title to land can only be conveyed by deed, and where title is registered, by registration. So far as land is concerned, where there is a transfer for joint use or benefit we propose that any joint ownership should lie in equity only. Although in theory it would be possible to devise a scheme of statutory legal ownership, it would be impossibly complex. The effect on third parties is considered below[12]. As far as household goods are concerned, we recommend that they should be jointly owned in law as well as in equity. Legal ownership of chattels can be transferred quite informally and to impose it by statute will not be contrary to any general principle of law. Where money is concerned, if it is in cash, then the spouses can be jointly legal owners of it. However if they are to become jointly entitled to money in a bank account,[13] then it would not be appropriate for them to become joint legal owners. The bank's contract must be with the account holder and the bank must be entitled to deal with the account holder as sole legal owner. The other spouse's interest will be in equity, the legal owner holding on trust for him or her. It was put to us, in a response to the working paper, that imposing joint ownership on savings (which, of course, the Married Women's Property Act 1964 already does) could cause difficulties for banks and building societies who would have to inquire as to the marital status of anyone opening an account in a sole name. However, if, as we believe, the other spouse's rights will necessarily lie in equity only, we do not anticipate any new problems arising from our recommendation.[14] Such problems as may arise where there is co-ownership already exist.

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[11] Or, of course, to confer sole ownership on the other spouse — the contrary intention need not be that the property is to belong to the paying spouse.

[12] Para. 4.16

[13] Or any other sort of account. The right to money in an account is a chose in action, that is, the bank has a contract with the customer to pay money to the customer up to the amount of the bank's debt to the customer.

[14] It is possible that a bank or building society might become a constructive trustee as regards the money if it paid money out to the account holder knowing that he intended to use it in a manner which would constitute a breach of trust but our recommendation does not give rise to this problem which already exists.

Effect on third parties

4.16 These recommendations will not create any new hazards for third parties. Much matrimonial property is already jointly owned. However, they will increase the amount of jointly owned property and thus it is necessary to have a brief look at the situation. Where land is affected by our recommendation, the joint ownership will be in equity only. If title to the land is registered, the equitable co-owners will have an overriding interest if in actual occupation. This would not cause great difficulties. Purchasers (including mortgagees) have become used to making inquiries of spouses, who may have acquired an equitable interest through contribution, or estoppel.[15] Where title to land is unregistered similar enquiries may have to be made[16]. Where personal property is concerned there may be some cause for concern but we do not think there is a major problem. If one co-owner sells property without the permission of the other, the likely effect is that the purchaser will not acquire a good title.[17] He may do so if he can show that the spouse was acting as an agent, or that the non-vendor spouse had allowed the vendor spouse to appear to have authority to sell and so is stopped from denying that authority.[18] However, merely being co-owner, or permitting the co-owner to remain in possession is not sufficient to give ostensible authority to sell.[19] None of this is new, and it already applies whenever personal property is co-owned, as it may well be if bought with money from a joint bank account. There is no evidence such joint ownership causes any real difficulties. The Scottish Law Commission considered whether there was any need for special protection for third parties when recommending a statutory presumption that household goods are co-owned. They considered that it was not necessary.[20]

Liability for debts

4.17 In some community property systems creditors can lay claim to some or all of the community property. Should our scheme give rise to such a possibility? Similarly, if one spouse has incurred a debt in order to purchase some property which becomes jointly owned under our recommendations, should the other spouse become jointly liable for the debt? We do not see that the fact that the property was acquired for joint use and benefit should give a creditor rights against the share of the property belonging to the other spouse. The debt is a personal liability. The creditor is in a position to demand greater security if he considers that it is necessary. In the vast majority of cases a creditor will rely principally on his own assessment of the creditworthiness of the debtor rather than on any residual value in the property sold or supplied. When credit is provided it is customary for enquiries to be made to establish the creditworthiness of the borrower. If our proposals are implemented a person providing credit in circumstances in which our recommendations would be likely to apply will be able to seek joint liability if he wishes to do so. Any seller unsure of a purchaser's creditworthiness can refuse to supply goods on credit without such joint liability or some form of guarantee. Consequently we do not recommend that in implementing our proposals provisions should be made for the creation of rights against the share of the property belonging to the other spouse. We do not believe that in practice our proposals will operate to the disadvantage of creditors.

4.18 A further aspect of liability is whether spouses should be liable between themselves to contribute to a debt incurred by one of them for their joint use and benefit. If one spouse borrows money to buy an item for their joint use and benefit, why should the other spouse acquire a share of it and not have to contribute anything towards the other spouse's debt? Nevertheless, on reflection we decided against recommending any such liability. Borrowing may take many different forms, so that the link between any specific debt and a particular item of property may be complicated or unclear. Nor is it always easy to tell whether or not a particular item has been bought with the aid of a loan, for example where the purchaser's bank account becomes overdrawn towards the end of the month. Further, such a proposal only looks fair if one examines each purchase separately. The other spouse may also be making contributions to the household by, for example, paying fuel bills or buying food. The aim of our proposed reform is, in the absence of a known intention to the contrary, to provide a clear rule that articles intended to be used jointly or for their joint benefit should belong to the parties

[15] *Williams & Glyn's Bank Ltd.* v. *Boland* [1981] A.C.487.

[16] Although in both cases the equitable interests will be overreached if payment is made to two trustees, *City of London Building Society* v. *Flegg* [1988] A.C.54.

[17] Although it is possible that the vendor/owner may pass a good title to his share of the goods so that the purchaser became a tenant in common with the vendor, *Barton* v. *Williams* (1822), 5 B, and Ald. 395.

[18] *Spiro* v. *Lintern* [1973] 1 W.L.R. 1002.

[19] F.M.B. Reynolds, *Bowstead on Agency* 15th ed., (1985), p.354. *Central Newbury Car Auctions* v. *Unity Finance* [1957] 1 Q.B. 371.

[20] (1984) Scot. Law Com. No. 86, para. 4.7.

irrespective of the source of the funds used to acquire them. To confer a corresponding liability upon the spouses to account as between themselves could easily reintroduce a link between payment and ownership and thus would risk undermining this basic aim. We believe that in this instance it is legitimate to leave the question of spouses' liabilities, should it be necessary to consider them, to the power of the court to re-allocate the property fairly between them on dissolution of the marriage.

The presumption of advancement

4.19 We proposed in the working paper and our proposal was generally liked, that the presumption of advancement should apply to both spouses. The detailed recommendation amounts to something slightly different from a straightforward extension of the presumption of advancement. If one spouse transfers money or property to the other not for joint purposes, it is to be presumed that a gift is intended, in the absence of evidence to the contrary. This change will remove a discriminatory aspect of the law, and do so in such a way as to reflect what is believed to be the wishes of most married couples. It will not force a spouse to make a gift. The transferring spouse can bring evidence (as indeed may anyone else interested) to show that he or she intended to retain ownership and that the receiving spouse was to be a trustee or an agent and that the receiving spouse knew of this. The requirement that the contrary intention be known to the other spouse is new but it is in line with our recommendations for Proposal (i), and for the same reasons[21] we think it appropriate here. We suspect that this recommendation will make relatively little change in practice, as the evidence at present required to prove a gift where property is transferred from wife to husband is not very great, but will avoid doubt and make the law more certain.

Implications for other areas of law

4.20 In any discussion of matrimonial property, the question of what happens on the ending of the marriage through death or divorce cannot be avoided. In many countries these two areas of law have been regarded as inseparable. Here they have not, and the recommendations in this paper refer to the spouses' rights during marriage only. On divorce the court has a discretionary power to vary the spouses' property rights,[22] and we do not propose any amendment of this. However, it may be true that altering property rights during marriage will have some effect on divorce proceedings. It may be that knowing who owns what and knowing in particular that most household goods are jointly owned is more likely to lead to an early settlement without the need to go to court.

4.21 Another possible future development would be to extend these provisions to those who cohabit without being legally married. They will, of course, automatically apply to engaged couples who live together, by virtue of section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1970.[23] These proposals do not create co-ownership as a result of marriage, but as a result of spending money for joint use or benefit. They could thus be applied to any situation where people spend money for joint use or benefit and where it seems appropriate to assume that joint ownership is likely to be an acceptable result to those spending the money. We did not consult on the position of cohabitants in our working paper, but some of those who responded suggested they should have been considered. We make no recommendation on this point now but mention it as a suitable topic for further consideration.

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[21] See para. 4.13 above.

[22] Matrimonial Causes Act 1973, ss.23-25.

[23] At the termination of an agreement to marry, any rule of law about the property rights of husbands and wives applies to property in which either or both of the parties had a beneficial interest while the agreement was in force; but this does not confer the power to make discretionary adjustments which exists when a married couple divorce; *Mossop* v. *Mossop* [1988] 2 F.L.R. 173.

PART V

SUMMARY

5.1 We *recommend* that in future the purchase of property (with some exclusions) by one or both spouses for their joint use or benefit should give rise to joint ownership of that property subject to a contrary intention on the part of the purchasing spouse, known to the other spouse.

5.2 We further *recommend* that transfer of property by one spouse to the other for their joint use or benefit should give rise to joint ownership of that property subject to a contrary intention on the part of the transferring spouse, known to the other spouse. If the transferred property is not for joint use or benefit it should become the sole beneficial property of the spouse to whom it is transferred, subject to a contrary intention on the part of the transferring spouse, known to the other spouse.

5.3 These recommendations do *not* extend to property purchased or transferred for business purposes.

5.3 We *recommend* that the Married Women's Property Act 1964 be repealed.

(*Signed*) ROY BELDAM, *Chairman*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT*
JULIAN FARRAND
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
4 November 1988

* Subject to the disagreement expressed in footnote 21 on page 4.

APPENDIX A

MATRIMONIAL PROPERTY BILL

DRAFT

OF A

B I L L

INTITULED

An Act to make new provision with respect to the beneficial ownership of matrimonial property. A.D. 1988.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Rules for determining beneficial ownership.

1.—(1) Where the parties to a marriage ("A" and "B") are living together in the same household and—

(a) A transfers to B property which is wholly or mainly for the use or benefit of both A and B;

(b) A transfers property to A and B jointly;

(c) A purchases property which is wholly or mainly for the use or benefit of both A and B; or

(d) A and B jointly purchase property;

beneficial ownership of the property shall vest in A and B jointly.

(2) Where the parties to a marriage ("A" and "B") are living together in the same household and A transfers to B property which is not wholly or mainly for the use or benefit of both A and B, beneficial ownership of the property shall vest in B alone.

(3) Subsections (1)(a) to (c) and (2) above do not apply where A has a contrary intention and that intention is known to B.

(4) Subsection (1)(d) above does not apply where either A or B has a contrary intention and that intention is known to the other.

(5) Subsection (1)(c) above does not apply in relation to any interest in land, policy or life insurance or contract for a deferred annuity.

(6) Subsections (1) and (2) above do not apply in relation to a transfer or purchase made wholly or mainly for the purposes of a business.

(7) In this section—

EXPLANATORY NOTES

Clause 1

1. This clause implements the primary recommendations in the report as to the purchase of property by spouses or transfer of property between them. The clause does not apply to separated spouses. The Bill does not contain any definition of "property" but it is intended that it should cover all forms of property except those specifically excluded by subsections (5) and (6). In particular, the transfer of money (including cash) is included, as is made clear by subsection (7).

Subsection (1)

2. Paragraphs (a) and (c) provide that joint beneficial ownership will arise where one spouse purchases property for the spouses' joint use or benefit, or where one spouse transfers property to the other for their joint use or benefit. Given the definition of "transfer" in subsection (7), paragraph (a) will cover the common situation of one spouse giving housekeeping money to the other, and so makes possible the repeal of the Married Women's Property Act 1964. These paragraphs implement proposal (i) in pararaph 4.1 and paragraphs 4.14 and 4.15 of the report.

3. Paragraphs (b) and (d) do not require that the property should be for joint use or benefit. The purpose of these paragraphs is to clarify the beneficial ownership where there is a transfer into joint names or a joint purchase.

Subsection (2)

4. The purpose of this subsection is, in effect, to make the presumption of advancement apply equally to husbands and wives. At present a transfer by a husband to his wife is presumed to be a gift to her, but not vice versa. The effect of the subsection taken together with subsection (3) is somewhat different from the presumption of advancement because it creates a rule rather than a presumption and the rule can only be displaced if the contrary intention is known to the other spouse. This subsection implements proposal (ii) in paragraph 4.1 and paragraph 4.19 of the report.

Subsections (3) and (4)

5. These subsections ensure that joint ownership does not arise where it is not wanted by a spouse who purchases or transfers property, provided that the contrary intent is known to the other spouse at the time of the purchase or transfer. This can be made known expressly or by implication. These subsections implement paragraphs 4.12 and 4.13 of the report.

Subsection (5)

6. This subsection excludes certain property from subsection (1)(c). Land or life insurance policies and deferred annuities purchased by a spouse will not become jointly owned simply as a result of purchase for joint use or benefit but they may do so if they are transferred for that purpose or transferred to the spouses jointly or if they are purchased jointly. This subsection implements paragraphs 4.2 to 4.10 of the report.

Subsection (6)

7. This subsection prevents the Act from affecting property purchased or transferred wholly or mainly for business purposes. The ownership of such property will be determined according to the existing law.

"interest in land" means any estate, interest or charge in or over land or in or over the proceeds of sale of land;

"marriage" does not include a void marriage or a marriage which has been dissolved or annulled;

"transfer" includes—

(a) in relation to any property, the doing by one person in relation to another of any act which, but for this Act, would vest the property in the other;

and

(b) in relation to a sum of money, the handing over of that sum in cash;

"use" includes enjoyment or consumption.

Short title, commencement etc.

2.—(1) This Act may be cited as the Matrimonial Property Act 1988.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

1964. c.19.

(3) The Married Women's Property Act 1964 is hereby repealed.

(4) Nothing in this Act applies in relation to a transfer or purchase made before the commencement of this Act.

(5) This Act extends to England and Wales only.

EXPLANATORY NOTES

Subsection (7)

8. This subsection contains four definitions.

   (a) The definition of "interest in land" includes interests behind a trust for sale.

   (b) The definition of "marriage" includes a valid polygamous marriage, and a voidable marriage.

   (c) The definition of "transfer" does not alter the existing requirements for the **effective** passing of property. The specific provision for cash is intended to avoid any possibility of a revival of the old case law which suggested that the handing over of housekeeping money by a husband was not a transfer and merely rendered his wife his agent.

   (d) The definition of "use" makes it clear that the word is intended to have a wide meaning.

Clause 2

1. The clause contains the short title, extent, repeals and commencement provisions.

APPENDIX B

RESPONSE TO CONSULTATION

A. ORGANISATIONS

Association of Women Solicitors*
Building Societies Association*
Church of England Board of Social Responsibility
Equal Opportunities Commission*
Family Law Bar Association*
Family Welfare Association
Holborn Law Society: Law Reform Committee*
Institute of Legal Executives
Law Society: Family Law Committee*
Lord Chancellor's Department*
Married Women's Association
Methodist Church: Division of Social Responsibility*
National Association of Citizens Advice Bureaux
National Board of Catholic Women*
National Council for One Parent Families*
National Council of Women of Great Britain*
National Federation of Women's Institutes
National Marriage Guidance Council*
Rights of Women
Senate of the Inns of Court and Bar
Trent Polytechnic Department of Legal Studies*

B. INDIVIDUALS

Mrs. A.J. Arundel
Mrs. H. Ault
Mrs. L.S. Bailey*
Mr. P. Barrett
Mr. C.J. Barton
Mr. R. Bayliss*
Mr. F.C. Benedito
Dr. M.W. Bryan, Queen Mary College
Mr. G. Carter*
Mrs. V. Conroy
Mrs. W.G. Creamer
Professor S.M. Cretney*, University of Bristol
Mr. R.D. Gibbens
Major L. Gill
Ms. M. Greenhill
Mr. J. Hall, St. John's College, Cambridge
Mrs. K.T. Harris
Mr. D. Hartley
Mrs. C. Hutchinson
Mrs. D.I. Jacobus*
Miss G. Lamb
Miss M. Lindsay
Miss C. Norris
Mrs. D. Oliver, University College, London
Mr. P. Parkinson*, UWIST
Mr. J. Platt
Miss P.J. Pound*
Mr. Registrar Price, Wandsworth County Court

Mr. F.J. Pridaam
Miss H.A. Prowse
Major E.J. Shaw
Mrs. P. Summerscale
Mr. Registrar Tickle*, Senior Registrar, Principal Registry of the Family Division
Mr. R.P. Towns, Lloyds Bank Trust Department
Mrs. A. Tremlett
Professor P.R.M. Webb*, University of Auckland
Mrs. J.D. Westwood*

THOSE MARKED * RESPONDED IN ADDITION TO THE SECOND PAPER.

APPENDIX C

MARRIED WOMEN'S PROPERTY ACT 1964
1964 CHAPTER 19

An Act to amend the law relating to rights of property as between husband and wife. [25th March 1964].

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Money and property derived from house-keeping allowance.

1. If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to the husband and the wife in equal shares.

Short title and extent.

2.—(1) This Act may be cited as the Married Women's Property Act 1964.

(2) This Act does not extend to Northern Ireland.

APPENDIX D

SECOND CONSULTATION PAPER

TRANSFER OF MONEY BETWEEN SPOUSES

Introduction

1.1 The major reform suggested by the working paper was that, rather than co-ownership applying to savings from a housekeeping allowance as at present, all money transferred by one spouse to another for common purposes should be jointly owned. There was substantial support for this suggestion. However, the underlying objective of the reform was to produce co-ownership in all cases where there is good reason to suppose that this was what was in fact intended, or would have been if the parties had addressed their minds to it at the time, and to do so irrespective of whether the correct formalities for achieving this under the present law had been adopted. In the light of that objective, we now incline to the view that in one respect our provisional proposals may have been too wide, whereas in another they may have been too narrow. Accordingly, before reaching any final conclusions, we are seeking the views of those who responded to the Working Paper on some alternative solutions.

1.2 Our provisional proposals may have been too wide in that we considered that joint ownership should apply unless the spouses had both agreed otherwise. It was not our idea, nor would it command significant support, to impose joint ownership on the reluctant. To insist on a contrary agreement would do this, as the providing spouse would have to ask for an agreement and might be hesitant to ask or unaware of the need to do so. We therefore now envisage that joint ownership will not apply where either spouse can prove that he or she did not intend it. Usually, of course, it will be the providing spouse who will want to prove this but occasionally the other spouse may be unwilling to become a joint owner of the property or money concerned.

1.3 We believe that this modification of our original proposals is essential if any significant widening of the scope of the Married Women's Property Act 1964 is to be acceptable. However, in respect of the savings from a house-keeping allowance which are now covered by that Act, the scope would be somewhat narrowed, as the Act at present requires a contrary agreement if co-ownership is not to arise. Hence views on this point may depend upon which of the solutions canvassed below is preferred.

1.4 Our original proposals may, however, have been too narrow in that they were confined to the transfer of money from one spouse to the other and to the purchase of property with that money. As we have said, there was substantial support for the proposition that money transferred for common purposes should (in the absence, as we now propose, of a contrary intention by the transferor) be jointly owned. However, we were anxious not to exclude couples who organise their finances for common purposes but do so without any transfer, e.g. where one pays for their accommodation while the other shops for food and cleaning materials. The concept of the "notional pool" had been developed by the courts as one means of identifying contributions to the purchase of a matrimonial home and seemed capable of application in this context too. Once again, there was considerable support for our suggestion that such circumstances should be covered.

1.5 One means of doing so would be to provide that where both parties spend money for common purposes, the whole shall be treated as jointly owned. On further consideration, however, this seems somewhat arbitrary in its operation. It would give rise to full joint ownership where one spouse had spent only a tiny amount on common purposes, while the other had spent a great deal, but not where one spouse had spent nothing at all. It would be difficult to identify a time-scale within which the expenditure of one spouse could or could not be treated as a contribution to the notional pool with the expenditure of the other. It would also be difficult to distinguish those who had operated their finances separately by choice, and with the intention of retaining individual ownership, and those who had operated separately by chance or for convenience but with the intention of pooling their resources.

1.6 The crux of the matter remains, in our view, not the way in which the parties have organised their finances, but the purposes to which that finance has been put. Consultation confirmed our impression that, in the united households with which we are concerned, a prima facie rule that money spent or set aside for common purposes results in joint ownership will in most cases produce the effect which the parties in fact intended, or would have intended if they

had thought about it at the time (it is, of course, common for married couples to give no thought to legal ownership when acquiring property for their joint use or benefit). In combination with our present suggestion that the provider of the money should be able to show a contrary intention, therefore, such a rule would be just. Accordingly we are canvassing some alternative methods of achieving this and some of the problems which these may entail.

Our Preferred Approach

2.1 The solution which we are at present inclined to prefer is that where money is paid by either spouse to the other or to buy property and the payment or purchase is for common purposes, the money or property will be jointly owned, subject to a contrary intention on the part of either spouse.

2.2 To expand a little, the purchase of property for common purposes would give rise to joint ownership, even though there had been no transfer of money to the other spouse and no expenditure on common purposes by the other spouse. This avoids the likely difficulties of the "notional pool". It might be thought that it would go too far and produce more joint ownership than is warranted. However, it would give way to a contrary intention which need not be communicated to the other spouse, so a spouse who wishes to retain sole ownership can do so. The main effect would be to produce co-ownership in household assets even though there was no thought to it at the time and/or the formalities technically required for a transfer to the other spouse (such as delivery of goods or a declaration of trust) had not been compiled with. It might be thought that this proposal alone is sufficient. However, it makes no provision for ownership of money that is not spent, and thus for the very savings with which the 1964 Act is concerned. Hence we would retain the idea of making money paid by one spouse to the other for common purposes into jointly owned money.

2.3 If joint ownership is to apply simply because one spouse purchases property for common purposes, the purpose for which the property is bought acquires great importance. The major means of identifying jointly owned property would be reference to the purpose or purposes for which, rather than the way in which, it was acquired. It is thus essential that whatever phrase is used in legislation should express a sufficiently clear principle so that spouses and their advisers can say to which property it applies. Our present intention is that spending upon or saving for the matrimonial home (including both capital and interest repayments on mortgage loans and insurance premiums for endowment mortgages), its acquisition or improvement, also furniture and equipment, food, cleaning materials, services (including statutory services and housework), family holidays, family cars, and the care and education of the children of the family should all be capable of falling within the purposes we have in mind. The acquisition of property for such purposes in return for a liability not yet discharged (for example, under a hire-purchase contract or other credit agreement) should also be covered. Where a purchase is partly for sole use or for use with someone else (e.g. a relative or friend) and partly for common purposes, the rule should apply if it is mainly for common purposes. (The rule would not confer any ownership upon the someone else).

2.4 The principle underlying "common purposes" is that the property or money becoming jointly owned should be for the use or benefit of both spouses in connection with their "common household". For example, carpets and furniture used by both would obviously be covered, but so would a cooker or washing machine which in practice was only used by one but which benefited both; a "family car" used by or benefiting both although not necessarily driven by both would be covered, but not a car used wholly or mainly for business (e.g. travelling to or at work); a boat used by all would usually be included, but not a camera or fishing rod or musical instrument used by and benefiting only one of them, as this would be for the purpose of individual recreation rather than the "common household". Such a concept would also exclude separated spouses, which is desirable as they are unlikely to wish to create more joint ownership. However, we are still not sure whether any such principle is sufficiently certain.

2.5 Alternatively it could be suggested that some significantly different underlying principle might be adopted. For example, a requirement of use for "domestic purposes" or "the expenses of the matrimonial home" might well be sufficiently certain in practice. However such phrases appear also to narrow the idea as detailed in the previous paragraph. Accordingly what we wish to learn is, first, whether the idea is acceptable or should be widened or narrowed, and secondly whether the idea, whatever it is, can be made sufficiently certain by legislation for spouses and their advisers to know where they stand.

A Further Approach

3.1 We are aware that our preferred approach is open to at least two criticisms. One, which we have already indicated, is the weight to be attributed to the concept of "common purposes" for which the property is bought or the money transferred. Another is that, although simpler and less haphazard than our original proposals, including the "notional pool", it may still appear arbitrary in its effects. Why should it apply only to money transferred for common purposes and not to property? The reason is that we envisage that the purchase of property for common purposes should itself give rise to joint ownership with the other spouse (unless a contrary intention is shown). Nevertheless there may be property which is owned before the marriage or is acquired otherwise than by purchase for common purposes, but is subsequently used for common purposes. We invite views as to whether it would be practicable as well as desirable to make such property jointly owned simple because of the fact that it is devoted to such purposes.

3.2 Following on from that, why should there have to be a transfer, whether of money or of property? If, as we suggest, property bought for common purposes can become jointly owned without the need for a transfer, why not make money or property set aside, but not yet spent, for common purposes also jointly owned? The money or property might be characterised by a phrase such as "ear-marked" or "identified" for such purposes and the ear-marking or identifying would need to be evidenced by some appropriate act or words of the spouse concerned. It would, in any case, give way to a contrary intention being established. The most obvious example would still be an actual payment or transfer. Other examples could be a "labelled" bank or building Society account or drawing a cheque for a particular purpose which has not yet been given to the intended payee. However, ear-marking or identifying is obviously a less certain notion than an actual transfer or payment. It might be preferable to have a somewhat arbitrary limitation than a rule which could prove difficult to operate in practice without resort to litigation.

A Less Radical Solution

4.1 Many of the difficulties with the 1964 Act which were indicated in the Working Paper could be solved simply by amending it to provide that any allowance made by a husband or wife to the other for the expenses of the matrimonial home or for similar purposes (an alternative version might be "for the purposes of their common household") shall, in the absence of any agreement between them to the contrary, be treated as belonging to them jointly. This would apply joint ownership to all "housekeeping allowances" and thus to property bought out of them. It would remove the difficulty about identifying savings as well as the difficulty that the present Act may not cover items upon which it was always intended that the money would be spent.

4.2 The amendment would not, however, make any contribution towards solving the problem of the "notional pool" and other methods of organising family finances. Nor would it solve the difficulty, frequently encountered in practice (although possibly treated somewhat robustly in the courts), of identifying the ownership of household goods. Our preferred approach involves attempting to do this. However, this might also be achieved by legislation along the lines of the Scottish provision referred to in Appendix C of the Working Paper and now enacted as s.25 of the Family Law (Scotland) Act 1985. Here the disadvantage, of course, is the limitation to "goods . . . kept or used at any time during the marriage in any matrimonial home for the joint domestic purposes of the parties". Money or securities, any motor car, caravan or other road vehicle, and domestic animal, are excluded, as is the home itself. Nevertheless we invite views upon the solution as a whole, as well as on whether the Scottish exceptions are appropriate.

Questions Arising

5.1 This paper, although short, raises a number of varied questions to which we seek reasonably specific answers. Accordingly, it might prove most helpful for this concluding paragraph, instead of attempting to paraphrase or precis what has already been said, to direct attention to particular points by cross-reference, as follows:

(a) the rule is now to be subject to contrary intent instead of contrary agreement (see paras. 1.2 and 1.3);

(b) the rule now proposed is that a payment or purchase for common purposes should produce joint ownership (see paras. 2.1 and 2.2, also para. 1.6);

(c) "common purposes" is to cover use by or for the benefit of both spouses in connection with their common household; is this a principle which will produce reasonable certainty in application? Are the details of its suggested application acceptable (see paras. 2.3 and 2.4)? Is there an alternative principle more certain/acceptable (see para. 2.5)?

(d) should mere usage for common purposes (i.e. without payment or purchase) suffice (see para. 3.1)?

(e) could merely "ear-marking" or "identifying" money or property for common purposes suffice (see para. 3.2)?

(f) simple amendment of 1964 Act (see para. 4.1)?

(g) adoption of Scottish solution (see para. 4.2)?

Whilst replies clearly could deal with this paper by taking these points as listed, we certainly do not want to preclude any general observations nor, indeed, to discourage any different approach. All further views will be welcomed as being of essential assistance to us in formulating our own proposals.

Printed in the United Kingdom for Her Majesty's Stationery Office
Dd 0500293 12/88 C15 60305 3383/2 39732 0575

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