

# The Law Commission

(LAW COM. No. 52)

## FAMILY LAW

### FIRST REPORT ON FAMILY PROPERTY: A NEW APPROACH

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

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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—

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# THE LAW COMMISSION

## *Item XIX of the Second Programme*

### **FIRST REPORT ON FAMILY PROPERTY : A NEW APPROACH**

*To the Right Honourable the Lord Hailsham of Saint Marylebone,  
Lord High Chancellor of Great Britain*

#### **INTRODUCTION**

1. Under Item XIX of our Second Programme of Law Reform<sup>1</sup>, which recommends a comprehensive examination of family law with a view to its systematic reform and eventual codification, we published on 26 October 1971 a Working Paper on Family Property Law<sup>2</sup>. The Paper offered a field of choice for the reform of family property law, and contained detailed proposals under five heads, as follows:

Part 1: *The Matrimonial Home* made proposals to improve a spouse's rights of occupation and for the introduction of a fixed principle of equal co-ownership of the matrimonial home<sup>3</sup>.

Part 2: *The Household Goods* made proposals aimed at protecting a spouse's use and enjoyment of the household goods<sup>4</sup>.

Part 3: *Family Provision* made proposals to extend the rights of dependants and the powers of the court in applications for family provision from the estate of a deceased person<sup>5</sup>.

Part 4: *Legal Rights of Inheritance* contained proposals for a system under which the surviving spouse would have a fixed legal right to inherit part of the estate of the deceased spouse<sup>6</sup>.

Part 5: *Community of Property* contained proposals for a system under which on the termination of a marriage by death or divorce certain assets would be shared between husband and wife on fixed principles<sup>7</sup>.

2. The main purpose of this First Report is to explain our general conclusions concerning the possible introduction of fixed property rights

<sup>1</sup> Law Com. No. 14 (1968).

<sup>2</sup> Working Paper No. 42. The General Introduction, which contains a summary of the main proposals discussed in the Paper, is reproduced in Appendix 2 to this Report.

<sup>3</sup> Paragraphs 0.25-0.30; Appendix 2, pp. 29-30.

<sup>4</sup> Paragraphs 0.31-0.32; Appendix 2, p. 31.

<sup>5</sup> Paragraphs 0.33-0.35; Appendix 2, pp. 31-32.

<sup>6</sup> Paragraphs 0.36-0.41; Appendix 2, pp. 32-33.

<sup>7</sup> Paragraphs 0.42-0.44; Appendix 2, pp. 33-34.

which would affect directly the ownership or entitlement to property of husband and wife during or at the end of a marriage. The fixed property rights put forward for consideration in the Working Paper were:

- (a) co-ownership of the matrimonial home (Part 1B of the Working Paper);
- (b) legal rights of inheritance (Part 4 of the Working Paper); and
- (c) community of property (Part 5 of the Working Paper).

We explain the reasoning behind our conclusions and indicate in the light of those conclusions what further work we are undertaking on the matters covered by the Working Paper.

### **The scope of consultation**

3. We have been assisted in reaching our conclusions by an exceptionally wide consultation and by a very great response from those who were invited to submit views on the Working Paper. We thank them for their careful consideration of a very long document, and for their detailed and helpful comments.

4. A major contribution to our work has been made by the Social Survey Division of the Office of Population Censuses and Surveys, which carried out on our behalf a national survey among married couples and formerly married people. The object of the survey was to find out how married people manage their property and financial affairs, how far they understand the present law and their views about some of the issues discussed in the Working Paper. The results of the survey, which were published in May 1972<sup>8</sup>, have been invaluable to us in our consideration of the subject. They have increased our understanding of the present situation and enabled us to estimate the impact of possible changes in the law.

5. A further source of help came from the views expressed at a number of meetings and conferences which were held to discuss the issues raised by the Working Paper and at which we were represented. Among these were: a seminar held at Manchester University in September 1970 (organised jointly by the Society of Public Teachers of Law and the Law Commission); a meeting of the Women's National Commission held in London in February 1972; a conference held in London by the Status of Women Committee in February 1972; a meeting of the Equal Rights Group held in the Houses of Parliament in July 1972; a session of the Annual Conference of the Young Solicitors' Group of The Law Society held at Warwick University in September 1972; a discussion session held at the Institute of Advanced Legal Studies in November 1972. We thank all those who organised or took part in those events.

6. The Working Paper attracted widespread interest from members of the public, many of whom sent us their views on the general issues. Those views were based in some cases on press comment and in others on the General Introduction to the Working Paper, which was distributed separately. Over 300 people replied to a questionnaire published by the John Hilton Bureau in "The Sun" newspaper in 1972. We very much appreciate the help given

<sup>8</sup> *Matrimonial Property*, by J. E. Todd and L. M. Jones (H.M.S.O., SBN 11 700129 5).

to us by the Bureau and by the Cambridge University law students<sup>9</sup> who analysed the answers and prepared a Report under the guidance of Mr. John C. Hall of St. John's College.

7. The great interest shown in the Working Paper reflects the importance attached to family property law by lawyers and laymen alike. Any change in the property rights of husband and wife would affect many married couples, and it is appropriate that so many should have taken the opportunity to express their views.

### **The field of choice: a new principle of family property law?**

8. The Working Paper pointed out that there has never been any systematic development of family property law<sup>10</sup>; with the important exception of the rules of intestate succession, and a few minor exceptions<sup>11</sup>, there are no special rules governing the ownership of family assets, even of such an important asset as the matrimonial home. The House of Lords affirmed recently that the property rights of spouses must be determined in accordance with the ordinary rules of property law<sup>12</sup>. Despite certain legislative reforms<sup>13</sup> the basic position has not been changed.

9. The Working Paper explained the reasons for dissatisfaction with the present law<sup>14</sup>. These depend partly on its alleged unfairness, partly on the uncertainty to which it leads (particularly in relation to the ownership of the matrimonial home) and partly on the fact that even where adjustments can be made, these depend upon the discretion of the court. The question was then posed whether the defects of the existing law could be cured by introducing a new principle or principles which would directly affect the property rights of spouses in accordance with fixed principles outside the sphere of discretionary support rights. Three principles were put forward for consideration: co-ownership of the matrimonial home, legal rights of inheritance and community of property. Views were invited about the acceptability of those principles and about the details of their application.

10. The causes for dissatisfaction with the present law as outlined in the Working Paper were generally accepted by those who commented upon it. A few, however, opposed the introduction of any form of fixed property rights between husband and wife on the grounds that they were unnecessary and that they were in themselves objectionable. They believed that in so far as the existing law led to any injustice, the proper remedy was to allow the court to exercise its discretionary powers in matrimonial or family provision proceedings. It was claimed that all necessary reforms could be achieved by developing the traditional discretionary systems, which ensured great flexibility. The principal reasons for considering any form of fixed property rights undesirable were as follows:—

<sup>9</sup> Messrs. K. J. Gray, J. D. Banks, A. G. Oppenheimer and W. N. Rees.

<sup>10</sup> Paragraph 0.1.

<sup>11</sup> Working Paper No. 42, paragraph 0.17.

<sup>12</sup> *Pettitt v. Pettitt* [1970] A.C. 777 (H.L.); *Gissing v. Gissing* [1971] A.C. 886 (H.L.). The application of the rules of property law in disputes between husband and wife has given rise to such a large body of case law that it may give the appearance of being a special branch of the law. That it is not is clearly illustrated by *Cowcher v. Cowcher* [1972] 1 W.L.R. 425.

<sup>13</sup> e.g., the Married Women's Property Act 1964.

<sup>14</sup> Paragraphs 0.12–0.16, 0.21–0.23; see Appendix 2, pp. 25–26 and 28.

- (a) fixed property rights would cause more dissension and injustice than they would alleviate;
- (b) the state should not interfere in the relations between spouses by imposing automatic rules regulating their property rights;
- (c) fixed property rights would deter marriage and compel people to take advice before marrying.

11. On the other hand, the great majority of those who put views to us regarded it as essential in the interests of justice and certainty to introduce a new principle under which the property rights of husband and wife would be determined in accordance with fixed principles. Overwhelmingly, they favoured co-ownership of the matrimonial home. We turn to this first.

### CO-OWNERSHIP OF THE MATRIMONIAL HOME

12. The matrimonial home occupies a most important place in family property law. Not only is it becoming more common for families to buy their own homes, but in many cases the home is the only substantial asset of the family<sup>15</sup>. Rapidly rising house prices have emphasised its position as the major family asset. The Working Paper considered the present law governing ownership of the matrimonial home<sup>16</sup>, and came to the general conclusion that it falls far short of the ideal, for the reasons outlined in the following paragraphs.

13. The Working Paper pointed out that property law is not only highly complex and technical but in its application to the matrimonial home it is also artificial, since it takes little account of the realities of family relationships<sup>17</sup>. The concept of separate property does not seem apt when applied to property which is jointly used, and to a situation where there is often a mingling of assets and where restraint is necessary in the interests of the other spouse and the family. Although the law emphasises the intentions or agreement of the spouses, it is hard not to agree with Lord Hodson that:

“The conception of a normal married couple spending the long winter evenings hammering out agreements about their possessions appears grotesque.”<sup>18</sup>

The artificiality and technicality of the law is not excused by certainty in application. Even after the House of Lords decision in *Gissing v. Gissing* it is difficult to state clearly the limited circumstances in which payments by a spouse for the benefit of the family will be regarded as contributions to the acquisition of the home. Another cause of uncertainty is the need to disentangle the transactions of the spouses, which may extend over many years, to calculate the exact proportions of their contributions. Further, if

<sup>15</sup> Paragraph 1.1 of the Working Paper. The Social Survey, p. 9, shows that 52% of married couples are owner occupiers; see also pp. 20-21.

<sup>16</sup> Paragraphs 1.27-1.51.

<sup>17</sup> Paragraph 1.49.

<sup>18</sup> *Pettitt v. Pettitt* [1970] A.C. 777, 810 (H.L.); see also Lord Reid in *Gissing v. Gissing* [1971] A.C. 886, 897 (H.L.). In *Matrimonial Property: Where do we go from here?* (Josef Unger Memorial Lecture, 1971). Professor Kahn-Freund points out the difficulties in making the ownership of property depend on intentions which were never in fact formed by the parties.



the house is in the name of one spouse, and the other has become entitled to a beneficial interest in it, there may be doubt in the event of a sale as to the respective rights of the beneficiary spouse and a third party purchaser.

14. The Working Paper accepted that the technicalities and uncertainties might be reduced within the framework of the present law. The main case for reform, it was thought, rests on a more serious objection, namely that any law determining ownership on the basis of financial contribution necessarily applies inequitably between husband and wife, because their different roles in marriage do not give them equal opportunities to make financial contributions to the acquisition of the home. It is said that it is unfair and unrealistic to concentrate on financial contribution and to take no account of a spouse's efforts in caring for the home and family. It was thought that these arguments led to the conclusion that ownership of the matrimonial home should be determined on a completely new basis<sup>19</sup>.

15. The position remains substantially as described in the Working Paper. Two cases decided since its publication confirm our view that the present law is in an unsatisfactory state, and illustrate the striking contrast between the rules applied to determine ownership of the matrimonial home during a marriage and the powers which can be used to adjust the spouses' property rights on a divorce. The first case is *Cowcher v. Cowcher*<sup>20</sup>, a dispute between husband and wife as to their interests in a matrimonial home which had been bought in the name of the husband. Following the ruling of the House of Lords<sup>21</sup> Bagnall J. decided the issues by applying strictly the equitable principles governing the formation and continuance of trusts; he expressly disregarded the fact that the parties were married or that the home was a family asset. He was not required to consider what would be fair and reasonable between the spouses; any contribution by either party, other than a strictly financial contribution, was irrelevant.

16. A very different approach was adopted by the Court of Appeal in *Wachtel v. Wachtel*<sup>22</sup>. After tracing the development of the present law relating to the matrimonial home, Lord Denning, M.R., considered the the scope of the court's powers to order financial provision on a divorce under the Matrimonial Proceedings and Property Act 1970<sup>23</sup>. He stressed the importance of section 5(1) (f)<sup>24</sup>:

"In the light thus thrown on the reason for subsection (1) (f), we may take it that Parliament recognised that the wife who looks after the home and family contributes as much to the family assets as the wife who goes out to work. The one contributes in kind. The other in money or money's worth. If the court comes to the conclusion

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<sup>19</sup> Paragraph 1.51.

<sup>20</sup> [1972] 1 W.L.R. 425.

<sup>21</sup> *Gissing v. Gissing* [1971] A.C. 886.

<sup>22</sup> [1973] 2 W.L.R. 366 (C.A.); Lord Denning M.R., Phillimore and Roskill, L.JJ.

<sup>23</sup> Lord Denning referred to that Act as "a reforming statute" . . . "designed to accord to the courts the widest possible powers in readjusting the financial position of the parties": p. 373.

<sup>24</sup> pp. 375-376. S. 5 sets out the criteria to which the court must have regard in exercising its powers to order financial provision. S. 5 (1) (f) is as follows: "the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family."

that the home has been acquired and maintained by the joint efforts of both, then, when the marriage breaks down, it should be regarded as the joint property of both of them, no matter in whose name it stands. Just as the wife who makes substantial money contributions usually gets a share, so should the wife who looks after the home and cares for the family for 20 years or more.”

17. These two cases demonstrate the great difference between the position during marriage or on the death of a spouse and the position on divorce. During marriage the efforts of a wife in caring for the family and the home give her no proprietary interest in the home. Unless she has made a financial contribution in circumstances entitling her to rely on the strict principles of trust law she cannot claim any proprietary interest in the home either during the marriage or on the death of her husband<sup>25</sup>. However, if the marriage ends in divorce, the interests of the spouses in the home can be determined by having regard to their joint efforts in the marriage partnership in whatever form. In our view the difference between the rules applied to married couples and those applied on divorce can no longer be regarded as acceptable.

18. In the course of his judgment in *Wachtel v. Wachtel*, Lord Denning, M.R., referred to the present law governing ownership disputes between spouses during marriage in the following terms<sup>26</sup>:

“The court never succeeded, however, in getting a wife a share in the house by reason of her other contributions: other, that is, than her financial contributions. The injustice to her has often been pointed out. Seven members of the *Royal Commission on Marriage and Divorce*<sup>27</sup> in 1956 presided over by Lord Morton of Henryton, said at p. 178:

‘If, on marriage, she gives up her paid work in order to devote herself to caring for her husband and children, it is an unwarrantable hardship when in consequence she finds herself in the end with nothing she can call her own.’

In 1965 Sir Jocelyn Simon, when he was President, used a telling metaphor [see [1970] A.C. 777, 811]: “The cock can feather the nest because he does not have to spend most of his time sitting on it.” He went on to give reasons in an address which he gave to The Law Society<sup>28</sup>:

‘In the generality of marriages the wife bears and rears children and minds the home. She thereby frees her husband for his economic activities. Since it is her performance of her function which enables the husband to perform his, she is in justice entitled to share in its fruits.’

But the courts have never been able to do justice to her.”

That is the essence of the case for reform<sup>29</sup>.

<sup>25</sup> On intestacy she has the right to appropriate the home in satisfaction of her interest in the estate of her husband; the intestacy rules apply equally to husbands and wives.

<sup>26</sup> p. 374.

<sup>27</sup> (1956) Cmd. 9678.

<sup>28</sup> (1965) 62 *The Law Society's Gazette*, 345.

<sup>29</sup> Working Paper No. 42, paragraphs 0.12, 0.13.

19. The Working Paper considered various ways of altering the present rules governing ownership of the matrimonial home<sup>30</sup>: a system of voluntary registration of co-ownership; a wide discretionary power to determine ownership, exercisable at any stage of a marriage; a rebuttable presumption of co-ownership; and co-ownership by operation of law. The provisional view reached was that "subject to suitable transitional arrangements a system of co-ownership would be a workable solution and that it would meet many of the objections to the present law"<sup>31</sup>.

20. The basic principle of co-ownership of the matrimonial home outlined in the Working Paper is that the interest in a matrimonial home should by law be shared equally between husband and wife unless they agree to the contrary. We considered in the Working Paper the practical implementation of the co-ownership principle, and the extent to which it should apply in certain special situations, for example, where a home was already owned before the introduction of co-ownership, where a home was owned before marriage, or where the home was part of business premises. A number of tentative proposals were made<sup>32</sup>. These, and all the matters raised in the Working Paper, are now being examined further by the Working Party we set up last year to advise us on the conveyancing and other legal problems to which the adoption of the principle of joint ownership would give rise and to advise us on problems associated with rights to occupy the home<sup>33</sup>.

21. It emerged clearly from the consultation that the principle of co-ownership of the matrimonial home is widely supported both as the best means of reforming the law relating to the home, and as the main principle of family property law. The great majority who supported co-ownership included legal practitioners, academic lawyers, women's organisations and members of the public. Those who opposed co-ownership were those who were opposed to any form of fixed property rights, and they were relatively few in number<sup>34</sup>.

22. Widespread approval of the principle of co-ownership of the matrimonial home was also revealed by the Social Survey. Married couples were asked the following question<sup>35</sup>:

"Some people say that the home and its contents should legally be jointly owned by the husband and wife irrespective of who paid for it. Do you agree or disagree with that?"

91 per cent of husbands and 94 per cent of wives who took part in the survey agreed with the proposition: the remainder disagreed<sup>36</sup>. In the

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<sup>30</sup> Paragraphs 1.62-1.75.

<sup>31</sup> Paragraph 1.127.

<sup>32</sup> Paragraph 1.128.

<sup>33</sup> For details of the Working Party see Appendix 1, p. 21.

<sup>34</sup> Paragraph 10 above.

<sup>35</sup> *Matrimonial Property*, p. 38.

<sup>36</sup> In each case the sample was 1877. Among those who had been divorced or separated a higher proportion disagreed: pp. 66-67. In the Survey conducted by the John Hilton Bureau (in which readers were invited to give their views) 80% of women and 56% of men thought that marriage happiness and stability would be increased if certain property were shared (the sample was approximately 200 for women and 100 for men).

case of owner occupiers who had their home in the name of one spouse 87 per cent of both husbands and wives said that they regarded the home as belonging to both of them <sup>37</sup>.

23. The opinions expressed favouring the co-ownership principle are supported by a change in the pattern of ownership of the matrimonial home in recent years. The Social Survey analysed the pattern and found that 52 per cent of couples owned their home; among the home owners 52 per cent had their home in joint names <sup>38</sup>. However, when the figures were broken down by the year of purchase of the home it was clear that a marked increase in the rate of joint ownership began in the middle 1960's and is continuing <sup>39</sup>. The following table illustrates the position <sup>40</sup>:—

<i>Year the present house was acquired</i>	<i>Proportion of owner- occupiers who owned the home jointly</i>
1960-61	51 per cent
1962-63	47 per cent
1964-65	52 per cent
1966-67	57 per cent
1968-69	69 per cent
1970-71	74 per cent

In cases where the wife had made some financial contribution to the home the proportion of homes put into joint names was higher than in cases where there had been no such contribution <sup>41</sup>. The rate of joint ownership was also very high in cases where the couple had owned more than one home <sup>42</sup>.

24. The Survey considered the reasons for the trend towards joint ownership and concluded that <sup>43</sup>—

“ the factors associated with joint ownership of the matrimonial home were not those related to the couple themselves, such as the length of marriage and social class. Instead there were factors relating to the circumstances of purchase of the home; the year the present home was acquired; the number of times the couples had been through the process of buying a house and whether the wife had made any financial contribution to it ”.

25. Although co-ownership of the matrimonial home is, as the survey has shown, a régime very frequently adopted by husbands and wives, its introduction as a rule of law of general application would be a new departure; it is important that those who would be affected should be allowed by mutual agreement to adopt (or continue) an arrangement different from the automatic rule. Subject to that safeguard, however, it is our view that there

<sup>37</sup> p. 11.

<sup>38</sup> pp. 9-10.

<sup>39</sup> pp. 76-83.

<sup>40</sup> *Matrimonial Property*, p. 80.

<sup>41</sup> 81% of homes acquired in 1970-71 were in joint names where the wife had contributed: p. 82.

<sup>42</sup> pp. 80-81.

<sup>43</sup> p. 83.

would be great advantages in introducing the basic principle of co-ownership under which, in the absence of agreement to the contrary, a matrimonial home would be shared equally by husband and wife. It would reflect the realities of family life, in which husband and wife regard the home as "theirs" without considering the legal title or the principles of trust law. It would apply during the subsistence of the marriage and would give security of ownership to the spouse who is now considered by the law as having no proprietary interest in the home. It would recognise that each spouse contributes to the marriage and to the family and that the joint efforts of both make possible the purchase and maintenance of the home. It would eliminate the uncertainties of litigation in which ownership rights are established by proof of financial contribution.

26. As we have already indicated<sup>44</sup>, the case against the co-ownership principle rests first on the assertion that it is unnecessary to introduce any form of fixed principles into family property law, since all necessary improvements can be effected through the discretionary powers of the court. Recent cases have shown that discretionary powers can be and are being exercised on a broad and generous basis which in many cases will lead to the decision that the spouses should have equal interests in the home<sup>45</sup>. But those powers are essentially powers to adjust, rather than to determine existing proprietary interests, and can at present be exercised only where the parties are before the court in proceedings for divorce, nullity or judicial separation. Even if those powers could be exercised in cases where married persons were in dispute they would provide a most uncertain basis on which to decide rights of ownership, and it would still be necessary to go to court<sup>46</sup>. If, as we believe, it would normally be fair and reasonable for the court to decide that a husband and wife should have equal interests in the matrimonial home, the interests of justice and certainty would best be served by applying this rule directly during the marriage without the need to resort to the court.

27. It is also argued against the principle of co-ownership of the matrimonial home that it would be arbitrary and unfair in application. It might add a new mercenary incentive to marriage; in many cases one party to a marriage will be required to share the home although there will be no obligation to share other property; in some marriages when no home is owned, no corresponding family asset would have to be shared<sup>47</sup>. Further, it is said that automatic co-ownership of the home would be an unjustifiable interference in the property relations of spouses and in their freedom of choice. On this last point we stress again that it is of the greatest importance to ensure that a husband and wife remain free to make any arrangement they choose.

28. To the argument that co-ownership would be arbitrary and unfair our reply, and that of the great majority of those who submitted views, is that the present law leads to much unfairness and that the important issue is

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<sup>44</sup> Paragraph 10.

<sup>45</sup> *Wachtel v. Wachtel* [1973] 2 W.L.R. 366 (C.A.); *Trippas v. Trippas* (C.A.), *The Times*, 16 February 1973.

<sup>46</sup> The Working Paper considered such a solution and came to the conclusion that it was too uncertain a basis for the determination of interests in property: paragraphs 1.65-1.68.

<sup>47</sup> Working Paper No. 42, paragraphs 1.74-1.75.

whether implementation of the basic principle of co-ownership would lead to a greater balance of fairness than the present rules. Will the cases where co-ownership of the matrimonial home is seen to be fair and reasonable outnumber those where it is thought unfair? Since many married couples have already chosen to share their matrimonial home<sup>48</sup> the main impact of automatic co-ownership would be in cases where the home was in the name of one spouse. In such cases, its application would, we think, usually bring about a result in accordance with the original wishes or expectations of the spouses, though we accept that it would sometimes be contrary to the wishes of the spouse who is now the sole owner in law. Is co-ownership necessary and desirable in such cases?

29. We are convinced that the introduction of the co-ownership principle is necessary to overcome the unfairness of the present law, and that in the great majority of cases the application of such a principle would be fair and reasonable and would be accepted as such by husbands and wives. It would, in our view, lead to a far greater measure of justice between husband and wife than does the present law. Last, but not least, it would help to remove some uncertainties and anomalies in the present law which can give rise to so much wasteful and often distasteful litigation.

30. For all these reasons *we conclude* that the present rules determining the interests of a husband and wife in the matrimonial home are in need of reform by the introduction of a principle of co-ownership under which, in the absence of agreement to the contrary, a matrimonial home would be shared equally between husband and wife<sup>49</sup>.

## FAMILY PROVISION AND LEGAL RIGHTS OF INHERITANCE

31. The Working Paper put forward for consideration a system under which a surviving spouse would be entitled as of right to inherit a fixed proportion of the deceased spouse's estate<sup>50</sup>. For the purpose of discussion the proportion of one-third was suggested. A system of legal rights of inheritance for spouses and children applies in Scotland where, however, there is no law of family provision.

32. Legal rights of inheritance would seldom be significant on intestacy since the rules of intestate succession already give the surviving spouse a substantial interest in the estate of a deceased spouse<sup>51</sup>. Their main application would be where a will failed to make adequate provision for the surviving spouse. In such cases the surviving spouse already has a right to

<sup>48</sup> The current rate of acquisition of homes in joint names is 74%: *Matrimonial Property*, p. 80.

<sup>49</sup> See paragraph 62 as to the detailed implementation of that principle.

<sup>50</sup> For an outline of the system, see Working Paper No. 42, paragraphs 0.36-0.41 and 4.69-4.72; Appendix 2, pp. 32-33 and 38.

<sup>51</sup> Under recent changes the surviving spouse takes the first £15,000 plus a life interest in half the balance where there are children, and the first £40,000 plus half the balance where there are no children but other close relatives. In other cases the survivor takes the whole estate.

apply to the court for family provision. The relationship between legal rights and family provision was explained in the Working Paper as follows <sup>52</sup>:—

“Both legal rights of inheritance and family provision law are designed to take care of the case where a deceased has accidentally or deliberately failed to make adequate provision for the surviving spouse. What is adequate would be decided in the case of legal rights by a fixed rule, and in the case of family provision by a court exercising its discretion in the light of all the circumstances. Legal rights would have the advantage of establishing a fixed standard capable of application without resort to the court: family provision enables the court to do justice in the light of the actual circumstances of the estate and the survivor.”

It was not proposed that children or former spouses (whose marriage to the deceased had been dissolved or annulled) should have legal rights of inheritance; their position should, it was suggested, continue to be governed by the law of family provision. This was generally accepted by those who commented <sup>53</sup>.

33. There was a marked lack of support for the principle of legal rights of inheritance for a surviving spouse among members of the legal profession (practising and academic); and the preponderance of opinion among women's organisations and members of the public was against it. The continuing need for a law of family provision was hardly disputed. Of all those who submitted views to us only three would have preferred to abandon the law of family provision in favour of a system of legal rights of inheritance. The argument given in favour of legal rights was that stated in the Working Paper—the advantage of having a fixed principle which can be applied without the need to go to court.

34. The opponents of legal rights of inheritance (the great majority) fell into distinct groups. First there were those opposed to any form of fixed property rights. Secondly, there were those who favoured co-ownership of the matrimonial home while rejecting any other form of fixed property rights. Finally, there were those who favoured community of property (plus, in most cases, co-ownership of the home) and who regarded legal rights of inheritance as unnecessary. The main reason given by the first and second groups for regarding a system of legal rights as undesirable was that it would be too rigid and would not allow the circumstances of a particular case to be taken into consideration.

35. The Social Survey asked people to consider whether “the surviving spouse should have a right of inheritance, and whether they would prefer a system where the spouse had an automatic right to part of the estate left by will or whether they would prefer it to be left to the court to decide the right amount to be given to a spouse who felt hard done by” <sup>54</sup>. The

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<sup>52</sup> Paragraph 4.65.

<sup>53</sup> The Social Survey results showed that two-thirds of married couples thought parents should have no obligation to provide for children; two-thirds preferred family provision to legal rights of inheritance for children (pp. 48–50).

<sup>54</sup> *Matrimonial Property*, p. 46.

Survey report explains that it was difficult to design and to ask questions about this complex subject and that the questions could not be made to correspond exactly with the legal position <sup>55</sup>.

36. Husbands and wives had similar views about inheritance rights. Over half thought that a husband should have to make provision for the wife in his will <sup>56</sup>. Slightly less thought that a wife should have a corresponding obligation <sup>57</sup>. In each case the remainder thought either that a spouse should be entirely free or that it would depend on the circumstances. A somewhat similar pattern of replies was obtained when the same questions were put to widowed people; divorced and separated men were, however, very much in favour of freedom for a spouse <sup>58</sup>.

37. All married persons taking part in the survey were asked to choose between a system of law which provides that a spouse must be included in the will and one which allows an application to the court if a spouse feels unfairly treated. A little over half were in favour of a system requiring the inclusion of a spouse in the will <sup>59</sup>. The main reasons given by those preferring that system were that they thought it was right to make provision for a spouse and that they disliked the idea of going to court. Those who preferred the system of application to the court <sup>60</sup> thought it more flexible, as the court could consider whether the spouse deserved anything and could reach a fairer settlement <sup>61</sup>. When considering the results of the survey it is important to remember that those participating were choosing between two alternative systems and were not asked to consider the more complicated question of whether to replace an existing system of family provision or to reinforce it with a system of legal rights of inheritance.

38. In the light of all the comments and views received we have considered again the principle of fixed legal rights of inheritance for a surviving spouse and its relation to family provision law. If one were starting from the position as it was in England before the introduction of family provision law <sup>62</sup>, it would be necessary to consider the best means of protecting the interests of the family of a deceased person and to weigh up the relative advantages and disadvantages of an automatic system of legal rights and a discretionary system of family provision operating through an application to the court. However, as the Working Paper suggested, and as the results of our consultation confirm <sup>63</sup>, the issue now is whether it is necessary to supplement or reinforce family provision law by a system of legal rights.

39. Under family provision law the court can, in the exercise of its discretion, take into account the means and needs of all the parties concerned.

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<sup>55</sup> pp. 45-46. Some inconsistencies in the replies are discussed in the Survey, pp. 50-52.

<sup>56</sup> 55% of husbands and 59% of wives thought this.

<sup>57</sup> 45% of husbands and 51% of wives thought she should be made to include the husband in the will.

<sup>58</sup> pp. 69-70.

<sup>59</sup> 57% of husbands and 59% of wives: *Matrimonial Property*, p. 47.

<sup>60</sup> 43% of husbands and 41% of wives: p. 47.

<sup>61</sup> p. 48.

<sup>62</sup> The Inheritance (Family Provision) Act 1938 came into force on 13 July 1939. It has been considerably amended by the Intestates' Estates Act 1952 and by the Family Provision Act 1966; the amended text is printed as a schedule to the 1966 Act.

<sup>63</sup> Paragraph 33 above.



The standard of "reasonable provision" set by the legislation<sup>64</sup> and by decided cases probably has some influence on testators minded to be ungenerous to their dependants, and this may account for the fact that applications for family provision are comparatively few in number<sup>65</sup>. The Working Paper made a number of proposals to improve the effectiveness of family provision law. The object of those proposals was to give the court powers parallel to those which it has on applications for financial provision in divorce proceedings<sup>66</sup>, so far as the differing circumstances of death allow<sup>67</sup>. Our proposals were generally accepted by those who responded to consultation. We intend to publish a further Report on family provision law explaining the results of our consultation and the reasons leading to our detailed recommendations<sup>68</sup>.

40. One important conclusion which we have reached is that the surviving partner of a marriage should have a claim upon the family assets at least equivalent to that of a divorced spouse. This will be substantially achieved by the implementation of our proposal that the court, in deciding what order to make in an application for family provision, should have regard to the same criteria, so far as possible, as those which apply in proceedings for financial provision on divorce. The importance of the criteria laid down by section 5 (1) of the Matrimonial Proceedings and Property Act 1970<sup>69</sup> has been emphasised by recent decisions in which it has been held that they give the court the widest possible powers to re-adjust the financial position of the parties and recognise that in the normal case a wife should be regarded as being entitled to a share in the capital assets of the family<sup>70</sup>.

41. If the new powers proposed for family provision cases were applied in a similar manner, then, so far as the different circumstances permit, a surviving spouse who had not been adequately provided for could expect to be no less generously treated than a divorced spouse. This means, we think, that there should be a change in the objective of family provision, so far as the position of a surviving spouse is concerned. At present, the aim, as expressed in the legislation, is to secure reasonable provision for the *maintenance* of the deceased's dependants, and this is clearly narrower in concept than the provision of a fair share (although in any particular case it may amount to much the same thing). "Maintenance" is no longer the principal consideration in fixing the amount of financial provision for a spouse on divorce, and we have come to the conclusion that it would be anomalous to retain it as the main objective in determining family provision for a surviving spouse. This represents a change of view on our

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<sup>64</sup> See fn. 62 above.

<sup>65</sup> Working Paper No. 42, p. 160, fn. 8.

<sup>66</sup> Under the Matrimonial Proceedings and Property Act 1970.

<sup>67</sup> Paragraph 3.10.

<sup>68</sup> We hope to submit the Report during the course of 1973.

<sup>69</sup> Under section 5 (1) the court must have regard *inter alia* to "(c) the standard of living enjoyed by the family before the breakdown of the marriage; (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family".

<sup>70</sup> *Wachtel v. Wachtel* [1973] 2 W.L.R. 366; *Trippas v. Trippas* (C.A.), *The Times*, 16 February 1973; *Harnett v. Harnett*, *The Times*, 7 March 1973, p. 13. In *Harnett v. Harnett*, Bagnall, J. said that under section 5 (1), a wife whose marriage had *not* broken down should be treated as potentially entitled to benefit at some time from the husband's capital assets.

part<sup>71</sup>, but we are now of the opinion that the court in family provision cases might be inhibited from giving full effect to the new criteria corresponding to those applicable in divorce cases if the "maintenance" concept retained its present role in the family provision legislation.

42. It is against this background that we assess the case for a system of legal rights. The advantage claimed for legal rights of inheritance is that they would operate automatically without the need to go to the courts. There are, of course, technical arguments to be adduced against a system of legal rights; its introduction would involve a new and possibly complex set of rules. But the essential issue is whether a fairer result would be achieved if a spouse who has been disinherited were entitled to a fixed share of the estate in addition to the right to claim family provision. Most cases of disinheritance involve some degree of marital breakdown whether open or below the surface. The circumstances of each case can vary enormously: one spouse may have had greater assets than the other; one spouse may be solely responsible for the breakdown; one spouse may have family obligations not shared by the other. Whatever the situation, the survivor would be entitled to a fixed proportion of the estate of the first to die. In some cases legal rights of inheritance would seem fair, in others they would not. In some cases the survivor may need to be provided for, in others he or she may be better off than the deceased. Legal rights could not be varied to suit the individual circumstances of each case. The fixed proportion would apply in every case; even the spouse who had lived separately for many years without ever being dependent on the deceased would be entitled to the fixed proportion. A high proportion might increase the number of cases where the survivor's claim to legal rights seemed unfair in all the circumstances. A low proportion might be unfair to the survivor<sup>72</sup>.

43. Furthermore, so far from being a benefit to surviving spouses, it seems to us that there are two dangers in a system of legal rights for those whom it is designed to protect. The first is that the amount or proportion fixed for legal rights might come to be seen as the maximum to which a survivor was entitled, and might affect the drawing up of wills in a way prejudicial to a survivor's interests. The second danger is that if a surviving spouse were entitled to a fixed proportion of the estate under a system of legal rights it is difficult to predict what impact this would have on the exercise by the court of its discretionary powers in family provision cases. It might be hard to persuade a court that the survivor was entitled to more than the fixed proportion; on the other hand, the court would be unnecessarily hampered if the amount of the survivor's legal rights could not be reduced for the benefit of another dependant where it appeared too much in the circumstances. If the court could reduce the fixed amount, part of the advantage claimed for legal rights (*i.e.* their fixed nature) would be diminished.

44. Another consideration is that unlike the principle of co-ownership of the home legal rights would not affect the spouses' interests in property

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<sup>71</sup> The question was discussed in paragraph 3.6 of the Working Paper and our provisional conclusion in favour of retaining the "maintenance" concept appears in paragraphs 3.9, 3.76 and 3.78 (ii).

<sup>72</sup> See Working Paper No. 42, paragraphs 4.17-4.31 for a discussion of possible ways of defining legal rights of inheritance.

during marriage but would apply at the end of marriage. As we have indicated, our view is that the surviving partner of a marriage should have a claim upon the family assets at least equivalent to that of a divorced spouse. The principle of co-ownership of the home, if introduced, would close part of the gap left by the present law: it would operate during the marriage and its effects would survive the termination of the marriage, whether by divorce or death. For the rest, we believe that a strengthened family provision law, with its greater flexibility, is a better means of securing the survivor's interests than a system of legal rights. This view was supported by the majority of those consulted. The addition of a system of fixed legal rights of inheritance to the system of family provision law would, in our view, lead to uncertainty and confusion. Any advantage derived from the automatic operation of legal rights of inheritance would be offset by the disadvantage of rigidity and possible incompatibility with the new standards we propose for family provision law, and might even prejudice the survivor's interest in the estate.

45. *We conclude* that, if the principle of co-ownership of the matrimonial home were introduced and if family provision legislation were strengthened in accordance with the conclusions outlined above, it would be neither necessary nor desirable to introduce a principle under which the surviving spouse would have a legal right to inherit part of the estate of the deceased spouse.

### COMMUNITY OF PROPERTY

46. Part 5 of the Working Paper put forward for consideration tentative proposals for a system under which on the termination of marriage by death or by divorce the value of certain assets of the spouses would be shared equally between them<sup>73</sup>. Basically, during the marriage each spouse would remain free to acquire and dispose of property subject to the mutual obligation of support. At the end of the marriage the net gains, or surplus, derived from the efforts of the spouses during the marriage would be shared equally. Each spouse's gains would be valued and one spouse would have a money claim against the other. For convenience, we shall refer to the system described as one of "deferred community".

47. The proposals relating to such a system of "deferred community" attracted far more interest and comment than did those relating to legal rights of inheritance. No clear view, however, emerged from the consultation. Some supported the principle of community with enthusiasm. Others opposed it forcefully. In between were those who were neutral or mildly interested and those who thought community would be unnecessary if co-ownership of the matrimonial home were introduced. On balance, the majority did not support deferred community as outlined in the Working Paper.

48. The reasons advanced for supporting or opposing deferred community were broadly similar to the arguments set out in the Working Paper<sup>74</sup>. Some thought that community would give effect to the partnership element

<sup>73</sup> For a summary of the system, see Working Paper No. 42, paragraphs 0.42-0.44; 5.76-5.86; Appendix 2, pp. 33-34; 40-44.

<sup>74</sup> Paragraphs 5.76-5.77; see Appendix 2, p. 40.

in marriage and create definite property rights without the need to depend upon the exercise of the court's discretion; it was seen as a natural extension of the principle of co-ownership of the home into a wider field. Others thought that community could be unfair if applied arbitrarily without regard to the circumstances and to conduct, that it would be a cause of dissension and that it would be inconsistent with the independence of the spouses.

49. Very few took the extreme view that fixed principles of deferred community should replace the present discretionary powers exercisable on divorce or in family provision proceedings. The vast majority thought that existing discretionary powers should be retained.

50. The Social Survey asked married couples what they thought would be a fair settlement in the following circumstances<sup>75</sup>:—

“A married couple with no children acquire during their marriage a house on mortgage, the furniture, a car and some savings—altogether worth about £3,000. Then by mutual agreement they decide to separate and some financial arrangement has to be made.”

The situation was considered on the basis that both spouses had been earning and on the basis that the husband had been working and the wife had been looking after the home. A range of solutions was offered for each situation<sup>76</sup>.

51. Excluding those who said they “did not know”, the proportion of people who chose some form of sharing in each of the situations was over 90 per cent. Predominantly (in at least 75 per cent of cases) half-and-half sharing was preferred, and there was little difference in the views of husbands and wives:—

“Changing the situation from one where both spouses were earning to only one spouse earning did not result in a large shift of opinion as to what would be a fair settlement in the event of a breakdown of marriage. Nine out of ten thought the possessions should be shared and three quarters thought the method of sharing should be half and half”<sup>77</sup>.

52. The Survey stressed that they had expressly excluded from the situation factors which might have led to qualification, for example, whether there were any children or whether the separation was wanted by both spouses. Nevertheless, the results indicate that many people would consider that in principle some form of sharing at the end of marriage would be fair.

53. The principle of deferred community should be considered in the light of the conclusions we have already reached in this Report, namely that the principle of co-ownership of the home is a necessary measure which would be widely accepted as better achieving justice than the present law, and that a system of fixed legal rights of inheritance is neither necessary

<sup>75</sup> *Matrimonial Property*, pp. 41–45.

<sup>76</sup> The range was as follows: All to husband; all to wife; in proportion to earnings; half and half; one-third to wife, two-thirds to husband; two-thirds to wife, one-third to husband; some other arrangement (p. 42).

<sup>77</sup> p. 43.

nor desirable. Assuming, for the moment, that the principle of co-ownership of the home will be implemented, is the further step of introducing a system of community needed in order to attain the proper balance of justice?

54. The Working Paper pointed out that anomalies could arise if a fixed principle of sharing were limited to just one asset<sup>78</sup>. It would apply only where there was a matrimonial home. Further, the spouse who acquired an interest in the matrimonial home under the co-ownership principle might own other assets of similar or greater value which did not have to be shared. It was suggested that a wider principle of sharing might appear fairer. The results of the Social Survey throw some light on both these points<sup>79</sup>. The Survey confirms that spouses who do not own their home seldom have assets of any substantial value<sup>80</sup>. It also indicates that where a home is owned, it represents a substantial proportion of the total value of the spouses' assets<sup>81</sup>. For the majority of home-owners, sharing the home would, in effect, be sharing the most substantial asset of the family. How far is deferred community necessary as a means of eliminating the anomalies in other cases?

55. During the subsistence of a marriage the principles of deferred community would not alter the ownership of property. In contrast, the principle of co-ownership of the home would have an immediate effect on the ownership of property during marriage. Where a marriage ended in death the survivor would, in cases of intestacy, have a substantial interest in the estate of the deceased; deferred community would be unlikely to have any effect<sup>82</sup>. In other situations the community principle would have an effect comparable with that of legal rights of inheritance<sup>83</sup>. The main difference would be that under deferred community the assets of both spouses at the end of the marriage would have to be taken into account, whereas legal rights would operate only on the assets of the deceased. In either case the fixed rules have to be considered in the light of the discretionary remedy of family provision law. We have already reached the conclusion that fixed legal rights of inheritance would be unnecessary if family provision law were strengthened<sup>84</sup>. Similar considerations would affect our view of deferred community if its application were confined to cases of death. But if it were justified in cases where a marriage ended in divorce it would be fair and consistent to apply it also to death cases.

56. Where a marriage ended in divorce<sup>85</sup>, there would, under deferred community, be a balancing of the assets gained during the marriage in accordance with fixed principles. But, as the Working Paper made clear<sup>86</sup>, the amount due to a spouse under the equalisation claim would be subject to the wide discretionary powers which the court already has to make orders

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<sup>78</sup> Paragraphs 1.75 and 5.79.

<sup>79</sup> See, in particular, *Matrimonial Property*, pp. 20-21.

<sup>80</sup> 19% of such couples estimated their assets as exceeding £1,000 (including 8% over £3,000): p. 20.

<sup>81</sup> *Matrimonial Property*, p. 20. Since the interviewing was done for the Survey (early in 1971) rapidly rising house prices may have further emphasised this point.

<sup>82</sup> Working Paper No. 42, paragraph 5.68.

<sup>83</sup> Paragraph 5.81-5.82; see Appendix 2, p. 41.

<sup>84</sup> Paragraph 45 above.

<sup>85</sup> The same principles would apply to nullity or judicial separation.

<sup>86</sup> Paragraphs 5.62, 5.83.

for financial provision<sup>87</sup>. Those powers can be used to re-distribute the family assets on divorce, and to bring about a sharing of assets in cases where this seems just. If a deferred community system were introduced the same powers would be used to vary the fixed community shares in cases where they did not produce a just result in all the circumstances. If the end result were the same in either case there would be no need to introduce deferred community. However, until recently it was not certain how the court's powers under the Matrimonial Proceedings and Property Act 1970 would be exercised. Some of those who commented on the Working Paper felt that more precise directions or guidance were needed to enable the court to achieve a fair distribution of the family assets. Others thought that there was too much variation and uncertainty attached to the present powers, which could be overcome only if reasons were given for decisions and greater publicity were given to orders relating to financial provision.

57. We agree that the application of those powers is a most important aspect of family property law. However, two recent decisions of the Court of Appeal have now shed light on how the 1970 Act will be applied. In *Wachtel v. Wachtel*, Lord Denning, M.R., referred to the Matrimonial Proceedings and Property Act 1970 as a reforming statute and said that sections 2 to 5 were "designed to accord to the courts the widest possible powers in readjusting the financial position of the parties and to afford the courts the necessary machinery to that end"<sup>88</sup>. He held that, unless the conduct of one party was both obvious and gross, "the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame"<sup>89</sup>. A similar approach was adopted by the Court of Appeal in *Trippas v. Trippas*<sup>90</sup>.

58. In *Wachtel v. Wachtel*, Lord Denning, M.R., considered the relationship between sharing the capital assets and ordering on-going financial provision; he thought an equal division of family assets would be fair where no maintenance was awarded, but that a continuing maintenance liability should affect the share of capital assets taken by the payee. He emphasised that "the essence of the legislation is to secure flexibility to meet the justice of particular cases, and not rigidity, forcing particular cases to be fitted into some so-called principle within which they do not easily lie"<sup>91</sup>. Lord Denning's judgment gives an indication of the potential scope of the new legislation and of the considerable powers it gives the court to bring about an equitable sharing. It appears unnecessary at this stage to superimpose a community structure upon those powers.

59. *Our conclusion* is that if the principle of co-ownership of the matrimonial home were introduced into English law much of what is now regarded as unsatisfactory or unfair would be eliminated, and the marriage partnership would be recognised by family property law in this very important context. Having regard to our conclusions regarding co-ownership of the

<sup>87</sup> Under the Matrimonial Proceedings and Property Act 1970, ss. 1-5.

<sup>88</sup> [1973] 2 W.L.R. 366, 373 (C.A.).

<sup>89</sup> p. 372.

<sup>90</sup> *The Times*, 16 February 1973. The principles of the Court of Appeal's two decisions have been applied by Bagnall, J. in *Harnett v. Harnett*, *The Times*, 7 March 1973, p. 13.

<sup>91</sup> [1973] 2 W.L.R. 366, 376.

matrimonial home, to the broad interpretation by the court of its powers to order financial provision on divorce, and to our conclusion that the court should have similar powers in family provision proceedings, we do not consider that there is at present any need to introduce a system of deferred community.

60. We would quote at this point the comment of the Women's National Commission, because it appears to us to represent the views of many who took part in consultations; it also eloquently summarises our conclusions:—

“It is our sincere hope that Parliament will find time at the first opportunity to consider the fundamental issues raised here, and to implement the recommendations in Parts I–III<sup>92</sup> which deal with urgent social problems. We remain unconvinced of the necessity for such root-and-branch changes as would result from the introduction of a system of legal rights of inheritance or of the concept of any kind of community of property, interesting as the ideas contained therein may be. Above all, we would deprecate putting at risk the real advantages to be gained from early legislation on the first 3 sections of this paper for the sake of hypothetical gains from Parts IV and V.”

### **SUMMARY OF CONCLUSIONS AND PROGRAMME OF WORK**

61. The two principal conclusions we have reached are as follows:—

- (a) The present rules determining the interests of a husband and wife in the matrimonial home are in need of reform by the introduction of a principle of co-ownership under which, in the absence of agreement to the contrary, a matrimonial home would be shared equally between husband and wife (paragraph 30).
- (b) So far as is practicable in the differing circumstances, the claim of a surviving spouse upon the family assets should be at least equal to that of a divorced spouse, and the court's powers to order family provision for a surviving spouse should be as wide as its powers to order financial provision on a divorce (paragraphs 40–41).

Assuming the implementation of our detailed recommendations for giving effect to conclusions (a) and (b) we have reached two further conclusions:—

- (c) It is neither necessary nor desirable to introduce a principle under which the surviving spouse would have a legal right to inherit part of the estate of the deceased spouse (paragraph 45).
- (d) It is not necessary to introduce a system of deferred community under which assets would be shared by husband and wife on fixed principles at the end of a marriage (paragraph 59).

62. In the light of those conclusions we are at present carrying out the following programme of work on the matters dealt with in the Working Paper:—

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<sup>92</sup> The Matrimonial Home; Household Goods; Family Provision.

(1) *The Matrimonial Home*

The Working Party to which we have referred above<sup>93</sup> is proceeding with its work. We hope to submit a Report with draft legislation covering co-ownership of the matrimonial home and occupation rights during the course of 1973.

(2) *Household Goods*

Recommendations for protecting a spouse's use and enjoyment of the household goods will either be included in the Report dealing with the matrimonial home or form a separate Report.

(3) *Family Provision*

We are at present considering our final recommendations and hope to submit a Report with draft legislation during the course of 1973.

(4) *Legal Rights of Inheritance*  
and

(5) *Community of Property*

In view of our conclusions we do not think, as at present advised, that further recommendations on these two matters are required.

(Signed) SAMUEL COOKE, *Chairman.*

CLAUD BICKNELL.

AUBREY L. DIAMOND.

DEREK HODGSON.

NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*

9 April 1973.

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<sup>93</sup> Paragraph 20 above; see Appendix 1, p. 21.



## APPENDIX 1

### **Working Party on Conveyancing Problems of Co-ownership of the Matrimonial Home**

On 7 August 1972 the Law Commission announced the setting up of a Working Party to advise them concerning the conveyancing and other legal problems to which the adoption of the principle of joint ownership of the matrimonial home would give rise; and also to advise them on problems associated with rights to occupy the home. The members of the Working Party are as follows:—

Mr. Claud Bicknell, O.B.E., *Chairman*

The Right Hon. Lord Justice Scarman, O.B.E.

Mr. P. J. Millett

Mr. B. M. F. O'Brien

Mr. R. N. Sax

Mrs. E. Southan

Mr. A. J. Tuck

Mr. R. T. Oerton, *Secretary*

## APPENDIX 2

### EXTRACTS FROM PUBLISHED WORKING PAPER No. 42

#### FAMILY PROPERTY LAW

#### GENERAL INTRODUCTION

##### **Some preliminary remarks**

0.1. There is really no such thing in English law as “family property”. We have a very elaborate law of property, but the family, though a social unit of great importance and recognised as such by the law, is not an entity that is given rights or even defined: it has failed to attract rights and duties comparable with those of an individual human being, a company, or a partnership. And so it is not surprising that English “family property law” is hardly more than a label given to the hesitant moves made by Parliament during the last hundred years to eliminate the grosser injustices inflicted by the common law upon married women in property matters.

0.2. The purpose of the Paper is to consider whether a genuine law of family property should be introduced into our law, and to indicate, albeit provisionally, some ways in which this might be done. One point is clear—and of crucial importance. The job of reform, if it is to be done, can only be done by legislation: the judges, however great their ingenuity and zeal for reform, cannot by judicial decision alone make the changes of legal policy that are needed<sup>1</sup>.

0.3. Progress towards a fairer distribution of property among the members of a family in the event of marriage breakdown was made in 1970 by the Matrimonial Proceedings and Property Act of that year<sup>2</sup>. While primarily designed to regulate the provision of financial support for the economically weaker members of the family when faced with a decree of divorce, nullity or judicial separation, it went substantially further. It made all the property of a husband (or a wife) available for the support of members of the family in need of such support; it conferred upon the court power to transfer property from husband (or wife) to wife (or husband) and from either parent to children; and it called upon the courts in the exercise of their extensive powers of property distribution to have regard to the contribution made by husband and wife to the welfare of the family—

“including any contribution made by looking after the home or caring for the family”<sup>3</sup>.

But the scope of the statute is limited. First, it applies only to situations of marriage breakdown—i.e. divorce, nullity, judicial separation, failure to maintain. Secondly, it is not, strictly speaking, a property statute: it does not alter the legal rules which determine the ownership of property. For

<sup>1</sup> A study of some recent decisions illustrates their difficulties: see, in particular, *Pettitt v. Pettitt* [1970] A.C. 777 (H.L.); *Gissing v. Gissing* [1970] 3 W.L.R. 255 (H.L.).

<sup>2</sup> The Act was largely based on Law Com. No. 25, (1969), *Report on Financial Provision in Matrimonial Proceedings*.

<sup>3</sup> s. 5 (1) (f).

instance, it does not declare that a wife's contribution by looking after the home confers upon her a right of property in the assets of the family: it is confined to empowering a court in certain circumstances to have regard to her contribution in deciding whether or not to transfer to her some or any part of her husband's property—or to make one or more of the financial orders available under the Act. In the Paper we consider whether a wife (or husband) or child should enjoy rights of property in the assets of the family as distinct from being offered the opportunity to apply for an order of the court.

0.4. This is a field in which it is all too easy to beg questions; for example, it does not follow that because "family property" is a subject requiring study there is a need to introduce radical changes into our law of property. A case for reform has to be made out, and certain fundamental questions answered. These include the following: should a wife (or husband or child) have a property right, or only the opportunity to apply to the court? If she should, what should be its extent and character, when should it arise, and how should it be made available? Is it to arise before the end of the marriage—whether by breakdown or death? Should the law, so far as property rights are concerned, discriminate between marriages ended by separation and those ended by death? Should the surviving spouse (or child) have rights of inheritance in the dead spouse's estate which the will cannot destroy?

0.5. "Property" is a vague term—having as many meanings as interpreters. It includes land, goods, money, insurance policies, stocks and shares—and much else. In family life it most frequently takes shape as follows:—

the home, its furniture and contents, the car, savings (cash, insurance policies, bank account, savings certificates, stocks, shares, contributions to a club, pension fund)—these are typical "family" assets.

0.6. In the Paper we consider proposals for reforming the law as to the ownership of the sort of assets described in the previous paragraph when they are met with in family life. We discuss a number of proposals for reform, some of which are merely extensions of the present law, and some of which relate to systems of ownership and division of property entirely new to English law. The General Introduction summarises the main proposals, shows their relationship to each other, and indicates what, in our view, is the field of choice for reform. We try at this stage to present the more important issues raised by the Paper in a simple, intelligible way, avoiding, where possible, the use of technical language. In the later parts of the Paper, which contain detailed discussion of the legal problems, a certain amount of technicality is unavoidable. A summary of the main parts of the Paper can be found at paragraph 0.25 and the principal questions which we think should be considered appear at the end of the General Introduction (paragraph 0.50).

0.7. Finally, we should mention that this study of family property law is part of a comprehensive examination of family law which the Law Commission is undertaking with a view to its systematic reform and codification<sup>4</sup>.

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<sup>4</sup> Law Com. No. 14, (1968). *Second Programme of Law Reform*.

0.8. The opinion of members of the public on the topics discussed in the Paper is of great importance. For this reason we seek to give it the widest circulation. Before it is decided what reforms should be introduced we regard it as essential not only to have views on our proposals, but also to obtain information on what married people do with their property and on their attitudes to property which is used, acquired or saved during family life. At our request, the Office of Population Censuses and Surveys, Social Survey Division, is now conducting a survey to ascertain: how married people manage their property and financial affairs; how far they understand the present law; and their views about the present law and about some of the questions considered in the Paper. It is expected that the results of the survey will be available by the end of 1971<sup>5</sup>.

### **The case for reform**

0.9. The law which at present governs family property is based on the principle of separate property, that is to say, each spouse may acquire and deal with his or her property as if he or she were single. With few exceptions, the fact that two people are married makes no difference to who owns what. The marriage relationship gives rise to certain obligations, including that of support, which may affect directly or indirectly a spouse's liberty to deal freely with his or her property. But neither these obligations nor the marriage relationship itself directly change the ownership of property.

0.10. The English position can be contrasted with that in many Western European countries, and in some parts of the United States, where systems of community of property are in force. These systems can take several forms. Sometimes certain property of the spouses is brought into a community fund during marriage; in every case, at the end of marriage, whether by death or divorce, certain assets must be shared between the spouses, irrespective of whether the item or items in question had been owned originally by one spouse or by both. Thus, marriage directly affects the property rights of the spouses. Under systems of community of property spouses are usually free to contract out by agreeing at the time of marriage that their property relationships are not to be governed by the normal community system of that country, but by some other system, such as that of separation of property. But people marrying in England do not have to consider whether to contract out since, in general, marriage of itself does not directly affect ownership rights while both live<sup>6</sup>. A few rich people find it necessary to consider whether to enter into a marriage settlement but their purpose is usually to provide for themselves and their family in a way which will lessen the burden of taxation or preserve a family estate: they are not concerned to alter any legal rules of property.

0.11. Separate property has not always been the rule in English law. Under the common law a husband had extensive rights over his wife's property. The equitable doctrine of trusts was applied to overcome the strictness of the common law, and in the nineteenth century a series of enactments, the most important of which was the Married Women's Property Act 1882, enabled married women to own and control their own separate property.

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<sup>5</sup> When the survey has been published it may be possible to distribute a summary of the principal results to those consulted on the Working Paper.

<sup>6</sup> A will is revoked by marriage, unless made in contemplation of the marriage in question. For other exceptions, see paragraph 0.17 below.

0.12. Historically, the concept of separate property was introduced as part of the movement for the emancipation of married women. It was an important advance to recognise the power of a married woman to deal with her own property independently of her husband. It operated fairly where a married woman had property or earnings, and was not the cause of hardship where a family had no hope of saving or acquiring property. Even in those cases where a husband had acquired some savings and property, the fact that his wife had no right to share the property but only her right as a dependant to be maintained was, perhaps, taken for granted in a society where it was normal for a woman, on marriage, to pass from dependence on her father to dependence on her husband. But the situation is now seen in a different light. Not only has the number of families able to save and invest increased, but the contrast has become more marked between the position of the married woman and that of her unmarried sister who earns her own living. It is said that equality of power, which separation of property achieves, does not of itself lead to equal opportunity to exercise that power; it ignores the fact that a married woman, especially if she has young children, does not in practice have the same opportunity as her husband or as an unmarried woman to acquire property; it takes no account of the fact that marriage is a form of partnership to which both spouses contribute, each in a different way, and that the contribution of each is equally important to the family welfare and to society<sup>7</sup>.

0.13. The first criticism of the law, then, is that it is unfair. This can be illustrated by taking as an example, the Browns. Mr. Brown earns the family income. The home is in his name and he is responsible for the mortgage repayments and outgoings. Mrs. Brown has given up her employment and earnings to attend to domestic affairs and to look after the family. She has no savings or private income, and cannot contribute in cash to the acquisition of property. If the marriage breaks down, the law regards the home, its contents, and any other property or savings acquired by Mr. Brown in his name, as his sole property. Mrs. Brown has a right to occupy the home and to be maintained, but she does not own the home or any other property acquired out of Mr. Brown's earnings. On a decree of divorce, nullity or judicial separation she may apply to the court for property to be transferred to or settled on her. If Mr. Brown dies leaving a will which disinherits her (though this is relatively uncommon) she has a limited right of support, available only on application to a court and at its discretion: she has no right other than to ask for what is normally needed for her support<sup>8</sup>. In short, she has no right of property in her dead husband's estate if he has made a will which disinherits her.

0.14. Several factors such as longer life expectancy, smaller families, and the move to equal pay, are leading to an increase in the number of earning wives and in the level of their financial contribution to the family. Even so, family circumstances, including the needs of young children, often make it impossible for a married woman to work at all, or to work full time, or result in an interrupted working life. The majority of married women either

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<sup>7</sup> See the *Report of the Royal Commission on Marriage and Divorce* (Morton Commission) [1956]; Cmd. 9678, paragraph 644.

<sup>8</sup> Inheritance (Family Provision) Act 1938 as amended.

have little or no income, or have lower earnings than their husbands; hence they have less opportunity to acquire property of their own. It seems unlikely that any dramatic social changes will occur in the near future to redress this imbalance. It is said therefore that the law should step in, and ensure that each spouse is entitled to a share in certain family property, irrespective of which spouse acquired it. This, it is said, would acknowledge the partnership element in marriage and would do no more than extend to the relatively uncommon case of the family which needs the support of the law the practice of happy family life<sup>9</sup>. In the great majority of families, there are no property difficulties: homes are frequently put in joint names, there is a joint banking account, and the man, as he grows older, becomes more and more concerned to safeguard his widow.

0.15. Criticisms of the present law are not limited to its unfairness. It is complained that the law is uncertain. This has been graphically illustrated by reference to the Jones family<sup>10</sup>: Mr. and Mrs. Jones have been married for ten years and have three children. When they married they bought a house on mortgage. The deposit was paid partly from Mrs. Jones' savings and partly from a loan from Mr. Jones' employer. The mortgage instalments have usually been paid by Mr. Jones. At the beginning Mrs. Jones had a job; she went back to part-time work when the children were older. From her wages she paid a large part of the household expenses and bought some of the furniture. Occasionally she paid the mortgage instalments. A car and a washing machine were bought on hire-purchase in Mr. Jones' name, but the instalments were sometimes paid by him and sometimes by her. Mr. Jones has now left his wife and children and is living with another woman.

0.16. If, in the above situation, Mrs. Jones asks what her property rights are so that she can make arrangements, she will receive no clear answer. In effect, the law will ask her what intentions she and her husband had about the allocation of their property, and to this she would only be able to reply that they had no clear intention. It is said that this is unsatisfactory, and that the law should give "a clear and definite ruling as to what belongs to whom".

#### **Outline of present law**

0.17. The general principles of separate property are that each spouse has independent and equal power to acquire and deal with his or her property, and that marriage does not alter ownership rights. Nevertheless, there are certain rules, which in practice are mainly applicable to husband and wife and which may affect the ownership of or power to deal with property. First, there are the following rules governing the acquisition and ownership of and succession to property:—

- (a) A spouse who has contributed to the acquisition or improvement<sup>11</sup> of the other spouse's property may thereby acquire an interest in the property.

<sup>9</sup> It would also give meaning to that part of the marriage ceremony (in accordance with the rites of the Church of England) in which the bridegroom undertakes to "endow" on or "share" with his wife his worldly goods. On this see Simon, "*With All my Worldly Goods...*" (Holdsworth Club of the University of Birmingham, 1964).

<sup>10</sup> This illustration is based on that given by Professor Kahn-Freund in *Matrimonial Property: Where do we go from here?* (Josef Unger Memorial Lecture, University of Birmingham, Faculty of Law, 1971), p. 11.

<sup>11</sup> *Matrimonial Proceedings and Property Act 1970*, s. 37.

- (b) The spouses are entitled to share equally savings from a housekeeping allowance made by the husband to the wife, or property acquired with such savings<sup>12</sup>.
- (c) Property purchased by a husband in his wife's name is presumed to be a gift to her, in the absence of evidence to the contrary.
- (d) A spouse is entitled to a substantial interest in the other spouse's estate if the latter dies intestate.

0.18. Secondly, there are several ways in which the law recognises the family relationship as giving rise to certain property rights. Among these are social security benefits payable to a wife or widow by virtue of her husband's (or, in the case of a divorced wife, her former husband's) contribution; the presumption that a wife, as housekeeper, has power to contract on her husband's behalf for the purchase of household necessities; the estate duty exemption on the passing of the surviving spouse's life interest; the rule that the transfer of property by one spouse to the other while they are living together is not chargeable to capital gains tax, except in special circumstances; and the adding together of the spouses' income for tax purposes<sup>13</sup>.

0.19. Thirdly, the spouses' property may be affected by support rights enforceable through the courts. The chief rights under present law are:—

- (a) The right, in some circumstances, to apply for a maintenance order in the magistrates' court.
- (b) A similar right to apply for financial provision in the High Court or county court on the ground of wilful neglect to maintain.
- (c) The right to apply for financial provision in proceedings for divorce, nullity or judicial separation.
- (d) The right to apply for family provision from the estate of the deceased spouse or former spouse.
- (e) The right to occupy the matrimonial home.

0.20. Although we have drawn a distinction between property rights and support rights, they are, in fact, complementary<sup>14</sup>. During a stable marriage the distinction has no importance: each spouse shares the use and enjoyment of the other's property and income and each helps to support the family. But when a marriage ends in breakdown or in death it becomes important for a spouse to know the extent of both property rights and support rights. A wife with property rights in the family assets will have less need to rely on support rights; a wife who successfully enforces support rights against her husband may obtain either the ownership or the use of some of his property. The close relationship between support rights and property rights has been further emphasised by the Matrimonial Proceedings and Property Act 1970 to which we have referred. Under that Act the court, on the grant of a decree of divorce, nullity or judicial separation, has power to order a spouse to

<sup>12</sup> Married Women's Property Act 1964.

<sup>13</sup> Under the Finance Act 1971, s. 23 and Schedule 4, provision is made under which if an election is made a wife's earnings will be charged to tax as if she were a single woman with no other income.

<sup>14</sup> See the comments of Lord Denning, M. R., in *Button v. Button* [1968] 1 W.L.R. 457, 462 (C.A.) and *Gissing v. Gissing* [1969] 2 Ch. 85, 92 (C.A.). See Gareth Miller, "Maintenance and Property" (1971) 87 L.Q.R. 66.

make financial provision for the other spouse by way of periodical payments, a lump sum, a transfer or settlement of property, or by variations of settlements. These powers enable the court to effect a redistribution of the family assets upon the termination of the marriage by divorce, nullity or judicial separation.

0.21. It can be argued that the Act of 1970, taken together with the family provision legislation, makes it unnecessary to consider further changes in matrimonial property law. The argument runs as follows:—in a happy family there is no problem: when marriage ends by separation or death, the court can make the appropriate property adjustments, taking into account the wife's contribution in the home as well as other relevant matters. This argument, however, fails to deal with two important factors. The first is that neither the Act of 1970 nor the family provision legislation affects the spouses' property rights during the marriage. Adequate rules to deal with property during marriage are essential to give a proper sense of security to spouses in the position of Mrs. Jones, and to avoid disputes between Mr. and Mrs. Brown which might otherwise lead to breakdown. The second factor is that, largely as a result of the 1970 Act, the court now has wider powers to deal with property when a marriage is terminated by a decree of divorce, judicial separation or nullity than it has when a marriage ends naturally with the death of one spouse. Thus the final irony has been reached: a divorced woman is better protected by the law than is a widow. Such is the price of piecemeal law reform.

0.22. But the basic objection to the argument that the Act of 1970 and the family provision legislation are all that is needed goes deeper. It would, of course, be possible by amendment of existing legislation to give the courts power to adjust the property rights of spouses during the marriage and to ensure that widows were treated by the law as solicitously as separated or divorced women. But even if this were done, the property rights of the parties would have to be assessed by the court in the exercise of its discretion, having regard to the means, needs and conduct of the parties. It is the discretionary nature of the parties' rights which, as we see it, is the fundamental cause of the present dissatisfaction with the law. In effect what women are saying, and saying with considerable male support, is:—

“We are no longer content with a system whereby a wife's rights in family assets depend on the whim of her husband or on the discretion of a judge. We demand definite property rights, not possible discretionary benefits.”

0.23. This demand points to one of the central problems faced by the Paper—the choice between discretionary powers and fixed rights as a basis for dealing with family property. Because many regard discretionary powers as an inadequate means of securing property rights the Paper considers various systems of fixed rights under which each spouse would be given an automatic interest in certain assets, irrespective of which spouse bought them, or in whose name they were, or of discretionary factors. Nevertheless, despite the objections to discretionary powers as a means of securing property rights, they remain an essential element in the enforcement of support rights. The Paper will consider how these discretionary support rights could be extended and improved.



0.24. Although reference has been made to "family assets", the term has no precise legal meaning<sup>15</sup>. It is no more than a synonym for "family property", also a term of no precise legal meaning. These terms are used to describe property acquired by the efforts of the spouses during the marriage, or property of either spouse from any source which is used chiefly for the benefit of the family as a whole; or even, sometimes, all the property of the spouses. We attempt no exact definition: we use either term as a convenient way of describing property in which, it seems reasonable to argue, both spouses should have some interest, either because of the way in which it was acquired or because of the manner in which it is used<sup>16</sup>. Accordingly, Part 1 of the Paper considers the matrimonial home as the principal piece of family property and deals with its ownership and occupation; Part 2 considers the household goods and is concerned with protecting their use and enjoyment; and part 5 considers whether the family assets to be shared equally on termination of the marriage could be defined in terms of the net gains made by each spouse during the marriage.

### Summary of the Paper<sup>17</sup>

#### 1. THE MATRIMONIAL HOME

0.25. The matrimonial home is often the principal, if not the only, family asset. Where this is the case, if satisfactory provision could be made for sharing the home, the problem of matrimonial property would be largely solved. Under present rules, apart from any question of gift or agreement, ownership is decided on the basis of

- (1) the documents of title, and
- (2) the financial contribution of each spouse.

Part 1 of the Paper considers whether there should be alternative ways or additional considerations for determining ownership.

0.26. One possibility would be to allow the court to decide ownership of the home on discretionary grounds whenever a dispute arose between the spouses, taking into account various factors, including the contribution of each spouse to the family. The provisional conclusion is reached that, on balance, this would not be a worthwhile reform in view of the existing discretionary powers to award financial provision (which include powers to order a transfer or settlement of the property of either spouse) on a decree of divorce, nullity or judicial separation. Further, it would leave ownership uncertain in the absence of litigation.

0.27. Another possibility would be to introduce a presumption that the matrimonial home is owned by both spouses equally. Unless one of the spouses contested the matter, the presumption would apply. In the event of a contest equality would prevail unless the presumption was rebutted.

<sup>15</sup> See the comments of Lord Upjohn in *Pettitt v. Pettitt* [1970] A.C. 777.

<sup>16</sup> Kahn-Freund, in *Matrimonial Property: Where do we go from here?*, attempts to define family assets or household property by reference to the purpose served by any particular item; see, in particular p. 23.

<sup>17</sup> Although for the sake of convenience and clarity, certain situations are discussed in terms of "the husband" and "the wife", all the proposals in the Paper are intended to apply equally to each spouse.

The chief problem under such a system would be to determine the circumstances in which the presumption should be rebutted. The choice may lie between narrow, and perhaps arbitrary, grounds and broad discretionary grounds which might result in considerable uncertainty.

0.28. A third possibility would be to go further than a presumption, which could be rebutted, and to provide that, subject to any agreement to the contrary, the beneficial interest in the matrimonial home should be shared equally by the spouses. We refer to this as the principle of co-ownership. The interests of the spouses would arise not from any financial contribution, nor from any contribution to the welfare of the family, nor from any other factors to be assessed by the court, but from the marriage relationship itself. There are advantages in this solution: it would in the absence of agreement to the contrary apply universally; it would acknowledge the partnership element in marriage by providing that the ownership of the principal family asset should be shared by the spouses; it would provide a large measure of security and certainty for a spouse in case of breakdown of marriage or on the death of the other spouse; and it would help to avoid protracted disputes and litigation.

0.29. The chief argument against the principle of co-ownership is that it could operate unfairly in individual cases. For example, a husband who paid for the house might find that, while he had to share ownership of it with his wife, he had no right to share *any* of her property. Since the sharing would operate only where spouses owned their home, the principle would not help Mrs. Brown if Mr. Brown chose to invest his money and live in rented accommodation. An automatic rule might even induce him not to buy a home. Besides these objections there are certain practical problems to be overcome. One is to decide to what extent a spouse who is given an interest should be responsible for the liabilities in respect of the home which she may have no means of discharging unless she shares in assets other than the home. A second is to determine whether a spouse should be called upon to share a home which he or she may have owned absolutely before marriage. A third and serious problem is how to protect the interest of a spouse whose name is not on the legal title, while at the same time safeguarding the interests of a purchaser or mortgagee. This, however, is essentially a matter of conveyancing machinery which should not be impossible to solve if it were decided to introduce the principle of co-ownership. The conclusion is reached that it would be practicable to introduce co-ownership, and that it would, on balance, have advantages over the present law. The Paper proposes that a new form of matrimonial home trust should apply whenever the beneficial interest in the home is shared between the spouses, in order that they should have a direct interest in the property.

0.30. Part I also considers proposals for strengthening a spouse's rights of occupation by amending the Matrimonial Homes Act 1967, and concludes that this would be desirable whether or not any of the other solutions were adopted.

## 2. THE HOUSEHOLD GOODS

0.31. Part 2 of the Working Paper considers whether any changes are necessary in the present law dealing with the ownership and use and enjoyment of the household goods. No precise definition of household goods is put forward but the overall objective would be to make effective a spouse's occupation rights. The present rules governing ownership of the household goods are similar to those which apply to the home itself. Nevertheless, although there may be a case in favour of a presumption of co-ownership of the goods, our preliminary view is that it is more important at this stage to protect the use and enjoyment of those goods than to change the ownership rules. The reason for this is that such goods usually have a rapidly diminishing realisable value; in most cases a spouse's share in the proceeds of sale of second-hand furniture would not go far towards the cost of its replacement (save in the case of antiques). Because of this a spouse's main concern is to retain the use and enjoyment of the goods and we propose that the spouse in occupation of the home should have this right. This would be essentially a support right supplementing the rights of occupation which are protected under the Matrimonial Homes Act 1967.

0.32. Part 2 also proposes that during marriage either spouse should be able to apply to the court for an order preventing the other spouse from removing the household goods from the home, directing the other spouse to restore the goods to the home, or directing which spouse is to have their use and enjoyment. The problems of applying the proposed system of protection to goods held under hire-purchase or credit sale agreements are also considered; the recommendations of the Crowther Committee<sup>18</sup>, if implemented, would remove many of the difficulties in this field. On termination of marriage by a decree of divorce or nullity, or on judicial separation, the household goods would, of course, remain subject to the court's powers to transfer any property of either spouse. There is a proposal in Part 3 of the Paper that similar powers should be exercisable on an application for family provision from the estate of a deceased spouse.

## 3. FAMILY PROVISION

0.33. Part 3 of the Paper considers the present law and practice under the Inheritance (Family Provision) Act 1938 and section 26 of the Matrimonial Causes Act 1965, and makes proposals for widening the scope of these enactments. At present a surviving spouse or former spouse, and children fulfilling certain conditions of age, sex and marital status<sup>19</sup>, may apply for maintenance from the estate of a deceased person, where the deceased has failed to make reasonable provision for them.

0.34. The right to apply for family provision is a right to be supported. Family provision law need not, however, remain confined to such a role. The Paper considers whether it could be expanded and developed as a system under which the court would be given wide discretionary powers to "re-write the will" by allocating the property of the deceased in order

<sup>18</sup> *Report of the Committee on Consumer Credit* (1971); Cmnd. 4596.

<sup>19</sup> A son under 21, an unmarried daughter, and a child who is by reason of some mental or physical disability incapable of maintaining himself or herself may apply.

to secure for the surviving spouse a fair share of the family assets, over and above her strict maintenance needs. The provisional conclusion is reached that this would not be an acceptable solution, since property rights would be dependent on discretionary powers, and great uncertainty, involving litigation and expense, would be introduced into the administration of estates.

0.35. Even if one assumes that family provision law is to continue in its present role as a support right there are, in our view, many anomalies and omissions in the law which should be remedied. The present class of applicants is narrowly drawn and the Paper considers whether the right to apply for family provision should be available to *all* children—whatever their sex or age, and whether married or unmarried; it also discusses whether the right to apply ought to be extended to all dependants, whether or not related to the deceased. If the classes of applicants were to be extended, it would, of course, still be necessary to establish that the deceased had failed to make reasonable provision for the applicant. The Paper also proposes that the court's powers should be extended to enable it not only to order lump sums and periodical payments, but also to direct transfers and settlements of property forming part of the estate. Perhaps the most important proposal is to give the court a completely new power to investigate and set aside certain gifts or other transfers of property by the deceased which have had the effect of defeating claims by dependants to family provision. These proposals would give the court powers similar to those which it has on a decree of divorce, nullity or judicial separation.

#### 4. LEGAL RIGHTS OF INHERITANCE

0.36. Part 4 of the Paper discusses a system under which a surviving spouse would be entitled as of right to a fixed proportion of the estate of the deceased spouse whether he died intestate or testate and regardless of the terms of the will. Under present law a spouse has fixed rights only in the case of intestacy.

0.37. Such a system is to be distinguished from community of property and from the right to apply for family provision. Although theoretically it could co-exist with "community", it would be a needless complication in a law which recognised and enforced a genuine community of property; accordingly we discuss it as an alternative or substitute for "community". It differs from the law of family provision in that an order for family provision is discretionary, and the amount of the order is assessed having regard to the means, needs and conduct of the applicant. A legal right of inheritance would be a property right in no way dependent upon the means, needs and conduct of the surviving spouse, all of which factors would be irrelevant. The system put forward for consideration is comparable with systems in certain other countries, including Scotland.

0.38. If any system of legal rights of inheritance<sup>20</sup> were introduced, various questions would have to be answered. Chief of these is whether the system

<sup>20</sup> In Part 4 we use the term "legal rights" to mean the legal rights of inheritance described in these paragraphs.

should replace the present law of family provision for a surviving spouse, or whether it should be in addition to that law. Provisionally we favour the latter view.

0.39 Other questions which arise are:—

- (a) what minimum amount or proportion of the estate should go, *as of right*, to the survivor,
- (b) whether a spouse should be able to waive a right of inheritance,
- (c) whether, and if so, how benefits received from the deceased during his life should be taken into account,
- (d) how to deal with dispositions made by the deceased with the intention of defeating rights of inheritance,
- (e) the relationship between rights of inheritance and the intestacy rules,
- (f) whether children should enjoy rights of inheritance.

0.40. We make a number of tentative suggestions as to the way in which these questions might be answered. For instance, we reach the provisional view that children should not have a legal right of inheritance; we suggest £2,000 or one-third of the estate (whichever is the greater) for the surviving spouse<sup>21</sup>; and we indicate that it may be better not to complicate the law by seeking a solution within a system of rights of inheritance of the problems of benefits received or dispositions made during the lifetime of the deceased. The appropriate context in which to consider these problems may well be that of family provision, where the courts will continue to have a discretion to set aside dispositions and to make such financial orders as are considered necessary for the support of the survivor.

0.41. A legal right of inheritance would accrue to a spouse only on the death of the other: thus it could not touch their property rights while both were alive, and would not be available to a spouse on divorce, separation, or nullity (though its loss as a result of divorce, nullity or judicial separation would, like the loss of a pension right, be considered by the court awarding maintenance). These limitations are in contrast with a system of community of property, such as that considered in Part 5, which would operate during joint lives and would be available to the spouses, however their marriage ended. While “community” has the advantage that its rights do not depend upon death, a system of rights of inheritance is less complicated and involves less interference with existing property law. In the great majority of cases—*i.e.* those in which a spouse makes adequate provision for his widow, or is content to leave the distribution of his estate to the rules governing an intestacy—there would be no need to invoke the law: a genuine disadvantage of “community” is that it presents all spouses with a complicated legal situation that more often than not requires legal advice to handle successfully.

## 5. COMMUNITY OF PROPERTY

0.42. Part 5 of the Paper considers how a system of community of property could be adapted for English law. The system put forward for consideration is not the traditional one of the Code Civil, but is based on

<sup>21</sup> In Scotland the survivor is entitled to one-third of the movable estate if there are surviving issue, and to one-half if there are no surviving issue.

the modern systems in force in Scandinavia and Germany. Under the system proposed, each spouse would be free to acquire and dispose of his or her own property during the marriage, subject only to those restraints which are necessary, even under a system of separate property, for the protection of the family, for example, to protect the other spouse's rights of occupation in the matrimonial home, to protect the use and enjoyment of the household goods, and to enforce support rights. When the marriage ended, whether by death or by a decree of divorce or nullity or on judicial separation, the net assets acquired during the marriage would be shared equally. In effect, this would be done by calculating the value of the spouses' assets; the spouse whose assets were less in value would have an equalisation claim against the other spouse. Where the marriage ended in death the claim would be against the estate of the deceased. The equalisation claim would give rise to a money debt but could be reinforced by giving the court power to order transfer of specific assets in satisfaction of the claim.

0.43. The Paper points out that certain categories of property could be excluded from sharing; for example, property owned by a spouse before marriage or property received during marriage by way of gift or inheritance from a third person. It is suggested that the exclusion be effected by taking account of the value of those assets at the date of the marriage or of their acquisition. The case for excluding these items is that it is difficult to justify the extension of sharing beyond those assets which have been acquired during the marriage by the efforts of the spouses. Another problem is the extent to which each spouse would be made liable for the debts of the other. We suggest provisionally that, except in respect of certain family debts which should be shared, neither spouse should have to surrender more than half his or her net assets even if the other spouse had extensive debts at the end of the marriage. We also suggest that a spouse should be able to call for an earlier sharing of assets, for example, if the other spouse seriously mismanaged his affairs. Although some of the rules necessary to deal with the special situations just described are complex, it is envisaged that for the great majority the system would be less complex than it appears. For example, in the cases of Mr. and Mrs. Jones and Mr. and Mrs. Brown, virtually all their property would be shared at the end of the marriage. A system of community under which substantially all property is shared at the end of marriage may be thought to lead to fewer anomalies in practice than any other system of automatic sharing falling short of community. For example, co-ownership of the home might require one spouse to share his asset while not calling on the other spouse to share anything.

0.44. A community system of the type considered would recognise the partnership element in marriage. It would meet the complaint that the present law is unfair to a spouse who has no earnings or assets, while preserving the independence and equality of the spouses during marriage. Although it would not directly change the ownership of property during marriage it would give the spouse who had little or no assets or earnings a large measure of security and certainty. It would no longer be necessary for that spouse to rely on the court's discretion to secure an interest in the family assets. The court would, however, retain its powers to enforce support rights, either in matrimonial proceedings, or on an application for family provision after the death of a spouse.

### The field of choice

0.45. The purpose of the Working Paper is to indicate, in broad terms, the field of choice for the reform of family property law. Some proposals are developments of existing law which, in our view, could be implemented regardless of whether any of the major changes is adopted. This category largely concerns support rights, and includes proposals to extend—

- (a) the protection of a spouse's rights of occupation under the Matrimonial Homes Act 1967;
- (b) the protection of a spouse's right to the use and enjoyment of the household goods;
- (c) the rights of dependants and the powers of the court under family provision legislation.

0.46. Other proposals considered would involve major changes in the present law. These are: co-ownership of the matrimonial home; legal rights of inheritance; and community of property. The following summary shows how each would work in conjunction with the existing support rights. However, none of these schemes is necessarily exclusive of the others, and we refer below to some other possible combinations. The discussion is based on the assumption that proposals (a) to (c) above, relating to support rights, will be implemented.

#### *(a) Co-ownership of the matrimonial home plus support rights during and on termination of marriage*

0.47. This scheme would provide that the beneficial interest in the matrimonial home should be shared equally, but would not otherwise affect ownership of property. During the marriage the spouses would have the benefit of the co-ownership principle, and would also be entitled to the usual support rights. On a decree of divorce, nullity or judicial separation the court would have discretionary powers to order financial provision for either spouse, and could order the transfer or settlement of any property of either spouse, including the home. For example, it could order the home to be transferred to one spouse, or to be sold and the proceeds divided, or to be settled for the benefit of the spouses or children. On the death of a spouse the survivor would already have an interest in the home, and would also have a right to apply for family provision from the estate; on such an application the court would have power to order the transfer or settlement of any property, including the deceased's interest in the home.

#### *(b) Legal rights of inheritance on death plus support rights during and after marriage*

0.48. This scheme would maintain the present rules concerning ownership of property, but would give the surviving spouse a right to inherit a defined proportion of the deceased spouse's estate. During marriage, the spouses would have support rights, including rights of occupation of the home and the right to protection of the use and enjoyment of the household goods. If the marriage ended by divorce, nullity or judicial separation, the court would have discretionary powers to order financial provision for either spouse and could order a transfer or settlement of the property of either spouse. If the marriage ended in death and the survivor had not been left

an adequate amount the legal right of inheritance could be claimed. Our provisional view is that the right to apply for family provision should also be retained to deal with those cases where legal rights were insufficient for the survivor's needs.

*(c) Sharing of assets on termination of marriage plus support rights during and after marriage*

0.49. A third scheme would be to introduce a system of community of property, or sharing of assets, such as that discussed in Part 5 of the Paper. Under such a scheme the spouses would, during marriage, continue to have mutual rights of support, including occupation rights in respect of the home and protection of the use and enjoyment of the household goods. At the end of the marriage, whether by death or by divorce or nullity, or on judicial separation their assets would be shared in such a way as to give one spouse an equalisation claim against the other, and possibly a right to claim specific items of property in satisfaction of the claim. The division would be supplemented by the court's discretionary powers to order financial provision, on a decree of divorce, judicial separation or nullity, or family provision on the death of a spouse.

**Questions for consideration**

0.50. The Paper puts forward for consideration proposals on which there will be many views. Those who believe that the unfairness of the present law could be overcome by giving the court discretionary powers to distribute property equitably on the termination of marriage by death or divorce would probably favour the present system of separate property, supplemented by extended family provision legislation. On the other hand those who think it is essential to have some form of fixed rights, in order to avoid the pit-falls of discretion and at the same time to achieve security for Mrs. Brown and certainty for Mrs. Jones, would favour either co-ownership of the home, or legal rights of inheritance, or community or some combination of these. For example, co-ownership of the home could be combined with legal rights of inheritance or with community of property.

0.51. At the end of each main Part of the Paper there is a summary of the proposals and questions put forward in that Part. Our object at this stage is to canvass views on which solution or combination of solutions is preferred or on whether there are other possibilities which should be considered. The principal questions which arise in this connection are the following:—

- (1) Should the law provide that, in principle, certain property should be shared between husband and wife irrespective of who paid or of their means, needs or conduct?
- (2) If the law were to provide that certain property should be shared between husband and wife, how should this be done?
  - (a) By giving both spouses an automatic and direct interest in certain property, such as the matrimonial home?
  - (b) By giving the surviving spouse a fixed right of inheritance on the death of the other spouse, but no fixed rights on divorce?
  - (c) By sharing the spouses' property at the end of the marriage, whether on death or divorce?



- (3) If it were decided that the matrimonial home should be automatically shared by husband and wife:
- (a) Should a home owned by one spouse before marriage, or acquired during marriage by gift or inheritance be shared?
  - (b) Should each spouse be liable to contribute to the outgoings of the home?
- (4) If the surviving spouse were to be given a fixed right of inheritance:
- (a) Should provision be made to prevent the deceased from reducing his estate by giving away property during his life?
  - (b) Should the survivor be able to apply to the court for further provision from the estate on the ground that the fixed rights did not provide adequate maintenance?
- (5) If it were to be provided that the spouses should share property at the end of the marriage, whether on death or divorce, what property should be shared?
- (a) All their property?
  - (b) All their property which could be regarded as given over to the family use, such as the matrimonial home and household goods?
  - (c) All their property acquired during the marriage?
  - (d) All their property except property owned before marriage or property acquired during marriage by way of gift or inheritance from a third party which has not been given over to the family use?

## PART 4

### LEGAL RIGHTS OF INHERITANCE

#### 12. CONCLUSIONS AND SUMMARY

4.69. We have put forward three possible systems of legal rights<sup>82</sup>: a simple system, under which no account would be taken of inter vivos dispositions by the deceased, and two more complex systems under which inter vivos dispositions in favour of third parties (and, under one of those systems, dispositions in favour of the survivor) would be taken into account. The arguments for and against each system have been set out<sup>83</sup>. In our view the survivor's right to apply for family provision could not be replaced except, possibly, by one of the more complex systems.

4.70. Although certain important questions have been left open, enough has been said to make it possible to consider the advantages and disadvantages of a system of legal rights as a means of protecting the survivor's interest in the family assets, and to compare it with the system of community of property discussed in the next section. The community system would apply to every marriage, however it ended, and would require the family assets of the spouses to be equalised. Legal rights of inheritance, on the other hand, would come into operation only when the marriage ended by death and only if one spouse disinherited or failed accidentally to make proper provision for the other, that is, only in a small minority of cases. Because of this, although both systems would give definite property rights, legal rights would probably have much less impact than community of property. Their chief effect would be to set a fixed minimum standard of provision for the survivor. Since legal rights would operate on the whole estate of the deceased, their value might be easier to calculate than the value of rights enjoyed under a system of community of property.

4.71. On the other hand a system of legal rights would be an imprecise way of protecting the survivor's interest in the family assets. It would take no account of the fact that the bulk of the family assets might already be vested in the survivor: the survivor's assets would be irrelevant unless derived from the deceased. It would not be limited to that part of the deceased's estate which could properly be regarded as family assets, and since it would operate only on death it would create a distinction between property rights on divorce and those on death.

#### **Summary of propositions concerning legal rights**

4.72. In order to assist readers in forming a view we set out below the main principles which we envisage as part of a system of legal rights of inheritance. This does not mean that we favour legal rights of inheritance over any other system. It merely represents our tentative views as to how they could be applied if they were introduced. There are, of course, many matters of detail which would remain to be decided before any system could be introduced. We set out as preliminary questions the matters which we have left open.

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<sup>82</sup> Paragraph 4.57.

<sup>83</sup> Paragraphs 4.55-4.57.

### **Preliminary questions**

- (i) If a system of legal rights were introduced into English law, which of the following would be best?
  - A. A simple system operating only on the estate, under which no inter vivos dispositions by the deceased would be considered.
  - B. A system with anti-avoidance measures to overcome attempts by the deceased to reduce legal rights by inter vivos dispositions in favour of third parties.
  - C. A system with both anti-avoidance measures and measures under which the survivor must give credit for dispositions by the deceased in his or her favour. (Paragraph 4.57.)
- (ii) If any of the above systems were introduced, should the right of a surviving spouse to apply for family provision be abolished? (Paragraphs 4.65–4.66.)
- (iii) What proportion of the estate should be given to the surviving spouse as legal rights? (Paragraphs 4.17–4.31.)

### **Provisional propositions** (assuming that legal rights were introduced)

- (i) The surviving spouse of a valid marriage should be entitled to legal rights of inheritance, provided there had not been a decree of divorce, nullity or judicial separation. (Paragraph 4.15.)
- (ii) The children of the deceased should not be entitled to legal rights of inheritance. (Paragraph 4.16.)
- (iii) A spouse should be entitled to renounce legal rights of inheritance, subject to safeguards. (Paragraph 4.32.)
- (iv) If any bequest or interest in the estate were left to the surviving spouse, the survivor should be entitled to elect whether to take it in partial satisfaction of legal rights. In the absence of express declaration to the contrary, the bequest should not be in addition to legal rights. (Paragraphs 4.33–4.35.)
- (v) If the survivor were left a life interest or other limited interest, the survivor should elect between this interest and legal rights of inheritance. (Paragraph 4.36.)
- (vi) If it were decided that account should be taken of certain inter vivos dispositions by the deceased in favour of third parties, the net value of the property comprised therein should be added to the net estate for the purpose of calculating legal rights. (Paragraph 4.44.)
- (vii) Legal rights of inheritance should be satisfied in the first instance from the estate of the deceased. (Paragraph 4.44.)
- (viii) If it were decided that the survivor should account for certain inter vivos dispositions in his favour by the deceased, the net value to the survivor of the property comprised in these dispositions should be added to the net estate for the purpose of calculating legal rights. (Paragraph 4.54.)

- (ix) There should be no discretionary power to bar or vary legal rights on the ground that the surviving spouse failed to fulfil matrimonial obligations. (Paragraph 4.61.)
- (x) The legal rights of inheritance of a surviving spouse should not be exempt from being charged with an order for family provision in favour of a former spouse or child of the deceased. (Paragraph 4.67.)

## PART 5

### COMMUNITY OF PROPERTY

#### 5. CONCLUSIONS AND SUMMARY

##### *(a) General*

5.76. The main advantage of a community system is that it would operate on fixed principles; the spouse with fewer assets would not have to depend on the court's discretionary power to obtain property rights on the termination of marriage. A community system would give practical effect to the proposition that marriage is a partnership, and should to some extent reduce disputes as to the ownership of property, by achieving equality of assets at the end of marriage.

5.77. On the other hand, a system which operates on fixed principles cannot take account of the special circumstances of each case. A community system might give an undeserved benefit to a spouse whose contribution to the marriage had been nil, and who had failed to fulfil his or her matrimonial obligations. Although it would not be essential for spouses to keep detailed records of their property transactions, the system might work unfairly to the disadvantage of a spouse who had not done so. A system of community would not replace the present laws of financial provision and family provision, which depend on discretionary factors. Nor would it eliminate, but might tend to increase, enquiries by the court into transactions which may prejudice a spouse's interest in the shareable assets.

##### *(b) Relation between a community system and other matters considered*

###### *(i) Co-ownership of the matrimonial home*

5.78. A system of co-ownership of the matrimonial home would be compatible either with a system of separate property, or with a system of community property. One difference in effect between community and co-ownership would be that co-ownership would give the non-owner spouse an immediate interest in the home, whereas a community system of the type discussed would give the non-owner a deferred equalisation claim. Where the home was the only asset, co-ownership would have the effect of an immediate community.

5.79. Another difference between co-ownership and community would be that under co-ownership the spouses would share just one asset, whereas under community they would share the value of the assets acquired during

the marriage. Where there were no substantial assets other than the home the effect would be similar, except that under co-ownership the sharing would be immediate and not delayed as under community. But where there were other assets a principle of sharing limited to just one asset could lead to anomalies (e.g. where one spouse owned assets of similar value which did not have to be shared). A wider principle of sharing might appear fairer in such cases, but would involve a more complicated and novel system of rules.

(ii) *Occupation of the matrimonial home: use and enjoyment of the household goods*

5.80. In parts 1 and 2 of the Paper we considered ways in which the law could protect the right of the non-owner spouse to occupy the matrimonial home and to retain the use of the household goods. The system of community we have discussed would not alter the ownership of property during the marriage, and would not eliminate the need for the improved systems of protection which we have proposed.

(iii) *Legal rights of inheritance*

5.81. A system of legal rights was put forward as an alternative to a system of community of property as a means of sharing assets on the death of a spouse. There are several important differences: community would take into account the assets of both spouses acquired during the marriage, whereas legal rights of inheritance would operate on the deceased's estate, irrespective of when it was acquired, and would take no account of the survivor's assets (except, possibly, where they were derived from the deceased); the community system would leave the survivor with at least half the value of the assets acquired during the marriage, whereas legal rights would give the survivor a share of the deceased's estate which might leave him with more or less than half; community would operate on death and on divorce, whereas legal rights would operate only on death.

5.82. The above comparison may suggest that a community system would be fairer than a system of legal rights. However, if one considers the relative merits of each system as a measure to overcome disinheritance, the balance in favour of community is less strong. The community system would make it necessary to work out the equalisation claim whenever a marriage terminated in death and accordingly, to value the assets of both spouses. On the other hand, since the number of cases of disinheritance is small, legal rights of inheritance would be relied on in comparatively few cases; only one estate, that of the deceased, would need to be valued, and this would have to be done in any event.

(iv) *Financial provision and family provision*

5.83. We have already indicated that in our view a system of community of property could not at present replace the law of financial provision after a divorce, judicial separation or nullity, or the law of family provision, amended in accordance with our proposals. The community system would provide for the equalisation of the assets acquired during the marriage in accordance with fixed principles. The fact that the share received by a spouse would not be determined by reference to discretionary factors may

be seen as the special advantage of community. But the amount due to a spouse on an equalisation claim may be more or less than would have been awarded as maintenance, and in cases in which the spouses had contracted out there would be no equalisation. As we have seen, the discretionary powers to award financial provision or family provision could operate so as to vary, in effect, the fixed rights of the community system.

*(c) Conclusions*

5.84. The system of community or sharing of assets which we have outlined in this part of the Paper is based on tentative views as to how such a system could operate in the fairest and simplest way possible in the light of present law and social attitudes. But such a system is inevitably complex, and many details would remain to be settled or varied in the light of consultation and comment. There are many practical arguments which could be put forward against a system of community. It would, as the Morton Commission pointed out, be an unfamiliar and novel concept in England. Many people might have to take legal advice at the time of marriage who would not now think of doing so. On the other hand it could be made to work, and it does work in other countries. In the last resort, the main question to be decided is whether it would lead to a greater measure of justice to give effect to the idea that marriage is a partnership, by sharing the assets acquired during the marriage, regardless of which spouse contributed financially to their acquisition. This question cannot be avoided on the ground that community is too difficult.

5.85. There is, of course, a case for saying that discretionary powers are all that is needed when a marriage ends in divorce, nullity or judicial separation. But the relative advantages and disadvantages of a system of fixed shares, such as community, and a system of discretionary powers should not be considered only in legal terms. It is important not to forget the advantages of security and status which a community system would give to the spouse who, because of marital and family ties, is unable to acquire an interest in the assets by a financial contribution. Instead of being, as now, regarded as a dependant, who must apply to the court, such a spouse would become an equal partner in marriage, entitled at the end of the marriage to claim an equal share in the net assets acquired during the marriage. The pattern of social development in the future may be that on the end of a marriage an able-bodied spouse would be expected to become self-reliant and independent as soon as possible rather than to look to the former marriage partner as a source of support for life. A system of sharing on fixed principles may be more in harmony with this idea than the present system of separate property, reinforced, in certain situations, by the enforcement, possibly over a long period, of maintenance obligations determined with regard to discretionary factors. These are matters on which many will have views, and we shall welcome them.

*(d) Summary of proposals for a possible system of community*

*Basic pattern of the system (paragraph 5.29)*

5.86. (i) During the marriage, each spouse would be free to acquire and dispose of his or her own property, subject only to such restraints as are necessary to protect the other spouse and the family.

- (ii) At the termination of the marriage, or in other special circumstances, there would be a sharing of the spouses' assets.
- (iii) The principle of sharing would be that the spouse with less assets would have a money claim against the other spouse or his estate for an amount sufficient to equalise the value of the spouses' assets.

*Application of the system*

- (iv) The spouses should be free to agree that the system should not apply to their property. Unless they expressly agreed that it was not to apply, it should apply (paragraph 5.30).
- (v) All the property of each spouse should be shareable, with the exception of property owned at the date of the marriage, property acquired by inheritance or by gift from a third party, and property which the spouses agreed to exclude from sharing (paragraphs 5.36–5.37).
- (vi) It should be presumed that all the property owned by each spouse at the date of sharing was shareable property unless the contrary was proved (paragraph 5.37).
- (vii) The value of property excluded from sharing should be deducted from the value of the assets of each spouse at the date of sharing to ascertain the value of the shareable assets. Certain problems relating to valuation are discussed in paragraphs 5.40–5.46.
- (viii) Neither spouse should be liable to contribute to the pre-marriage debts of the other spouse (paragraph 5.47).
- (ix) Spouses should be entitled to deduct outstanding debts from the value of their shareable assets; a spouse whose debts exceeded his or her assets would be deemed to have no assets, and would not be entitled to claim more than half the other spouse's net assets except where there was a right to claim contribution from the other spouse in respect of an obligation which should be shared jointly (paragraphs 5.48–5.52).
- (x) If a spouse abused his or her independent power to deal with property by entering into transactions not for value in a manner prejudicial to the other spouse's equalisation claim, the court should be empowered to add the value of property comprised in such transactions to that spouse's net assets in calculating the equalisation claim and, in certain circumstances, to avoid the transaction (paragraphs 5.54–5.55).
- (xi) A spouse should be entitled to apply for a sharing of assets in certain circumstances: *e.g.* where the other spouse had wasted his assets, abused his powers or become bankrupt, or where the parties had separated without prospects of reconciliation (paragraph 5.56).
- (xii) Either spouse should be entitled to apply for a sharing of assets whenever the court grants a decree of divorce, judicial separation or nullity (paragraph 5.60).

- (xiii) Where the marriage terminates in the death of a spouse, only the survivor should be entitled to apply for a sharing of assets; no equalisation claim should be allowed on behalf of the deceased's estate (paragraph 5.67).
- (xiv) Where the court grants a decree of divorce, judicial separation or nullity a spouse should be entitled to apply either for a sharing of assets or for financial provision or for both (paragraph 5.65).
- (xv) Where the marriage terminates in death the survivor should be entitled to apply either for a sharing of assets or for family provision from the estate or for both (paragraph 5.70).
- (xvi) Where the court grants a decree of divorce, nullity, or judicial separation, or where there was an application for a division of assets before the termination of the marriage, the court should have power to direct how the equalisation claim should be settled, and should have power to order transfers of specific assets from one spouse to the other in satisfaction of the claim (paragraphs 5.72-5.73).
- (xvii) Where the marriage terminates in death, the survivor should not, in general, be entitled to claim any specific asset in satisfaction of the equalisation claim unless the survivor already had an interest in that asset; on a successful application for family provision the court should have power to deal with specific assets forming part of the estate (paragraph 5.75).



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