THE NON-DEBTOR SPOUSE AND THIRD PARTY CREDITORS

As family lawyers involved in matrimonial property proceedings, the exercise we undertake is quite simple. When acting for a party to property proceedings it is the ultimate aim to ensure that the maximum share of the estate finds its way into our client's hands. Not only do we seek to maximise the contributions on the part of our client claimed under s. 79 and to maximise the "balancing factors" under s. 75(2), (whilst minimising those in relation to the opposition), but the two main other ways of achieving our objectives for the non-debtor spouse are:

(a) To obtain orders which place the maximum assets in the hands of our clients; and
(b) To ensure that the orders obtained place the minimum debt in the hands of our client.

It is both the first and second objective of the contest we call "property dispute" that this paper is concerned.

We can achieve the first objective by use of s. 79 of the *Family Law Act* 1975 and take on the contest relating to contributions and s. 75(2) factors. Alternatively, and on occasion in addition, we can avoid the contributions and s. 75(2) arguments by use of s. 78 of the Act. The first objective is achieved by removing some or all property from the fray and seeking to protect it from attack from the other spouse and from third parties alike. A spouse can attack such property under s. 79 but the third party creditor is powerless unless it can establish an interest in the property. If not, that creditor is left with a mere debt which may or may not be held to be the responsibility of the client. If we can achieve a determination that our client has a prior legal or beneficial interest in the property, then the third party creditor may be left taking its chances with the debtor spouse and without recourse to our client's property.

It is a fact of life that one or both of the parties in a matrimonial dispute may not be as altruistic in dealing with the property as the practitioners. We are required to take into account that a party may not intend that all or even any of the property should be taken into account or that substantial debt (perhaps even more than was apparent at a date of separation) ought to be taken into account when acting for the "victim" of such actions, we are required to recover the assets and ensure they are brought to account. We are required to take steps to ensure that where there is a realistic risk of the dissipation of assets the "other" spouse is

prevented from doing so. We are required to ensure that any "after acquired debt" is disregarded either altogether or, at the least, as between the spouses.

Within the parameters of those objectives, there are a myriad of different situations which may arise. Strategies to achieve those objectives should not be confined to the "traditional" s. 79 application. This paper is focussed on the position of the non-debtor spouse *vis-à-vis* the creditor. I have strayed from time to time to consider the position against the debtor spouse – at times deliberately to examine various remedies which might obviate the need to tackle the creditor and at times in order to understand the need to take on the creditor. On occasion I have been guilty of straying out of the curiosity that inevitably arises in research.

In the course of preparation of this paper, it became clear to me that there are a number of different situations in which the non-debtor spouse's position *vis-à-vis* the creditor needs to be considered. There are pre-separation transactions, transactions between separation and prior to trial, and transactions after orders have been made but prior to satisfaction of all orders made which need to be considered. The different circumstances may require the use of different strategies on the part of the non-debtor spouse to recover a "fair share" of the estate.

The Usual Application

Whilst we are all familiar with the "usual" way in which we conduct matrimonial property proceedings, an examination of the process and the treatment of debts is a logical start to the consideration of whether there are dangers inherent in the "usual" approach and whether we can conduct proceedings in a manner which might eliminate some of the risks the non-debtor spouse might be exposed to.

In proceedings between spouses in relation to property settlement, the first step in the process requires the Court to determine the assets and liabilities of the parties. That objective is achieved by deducting the value of the parties' total liabilities, including unsecured liabilities, from the gross value of the assets[1].

Where financial losses have been suffered by the parties to a marriage in the course of the pursuit of matrimonial objectives, such as in gaining income or in the acquisition of assets,

[1] *Biltoft and Biltoft* (1995) F.L.C 92-614

then, whether the liability is joint or several, the losses should be shared by the parties and should be taken into account in altering property interests[2].

As a general rule, the Family Court will take the assets of the parties as it finds them. It cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the rights of the party who owns it[3].

In determining an application under s. 79 of the *Family Law Act* 1975, the Court will not ignore the fact there is a legitimate liability, even if the liability is contingent or is yet to be established. Some debts may be disregarded by the Court – e.g. where the Court concludes that the alleged liability is unlikely to be called up[4] or if it is vague or uncertain, or if it is unlikely to be enforced of if it was unreasonably incurred[5].

Where one spouse has incurred a liability in deliberate or reckless disregard of the other party's potential entitlement under s. 79 the Court may, as between the spouses, either wholly or partially disregard a debt to a third party[6].

There are many ways in which the net estate may be diminished. Not all involve third party creditors – some involve the other spouse him or herself and others involve their proxy.

The first situation which may be acknowledged is the one in which one spouse adopts a "self help" attitude to the assets of the parties and either retains the value of them in another form or does not otherwise dispose of all of them. If there are sufficient assets remaining from which an adequate property entitlement can be effected then the Court will order that those assets be transferred to the "innocent" spouse by treating the assets received by the "errant" spouse as having been received by way of "premature distribution of a proportion of the matrimonial assets"[7].

The next situation to recognise is the one in which one spouse sets out to transfer all property to a "third party" in order to defeat the claim (real or anticipated) of the other party. Such transactions would normally be attacked by the non-debtor spouse using s. 85 provided the

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[2] *Kowaliw and Kowaliw* (1981) F.L.C. 91-092 per Baker J at 76,645
[3] *Ascot Investments Pty Ltd v. Harper & Anor* (1981) 148 CLR 337 at 355
[4] *AF Petersens* (supra)
[5] *Biltoft and Biltoft* (1995) F.L.C. 92-614 at 82,127
[6] *Kimber and Kimber* (1981) F.L.C. 91-085; *Kowaliw and Kowaliw* (1981) F.LC 91-092; *Antmann and Antmann* (1980) F.L.C 90-908; *Af Petersens and Af Petersens* (1981) FLC 91-095
[7] *Townsend and Townsend* (1995) F.L.C. 92-569

innocent" spouse can demonstrate a likelihood that the transaction may defeat an anticipated order (in proceedings which must be issued at the time the application under s. 85 is made).

Gould and Gould; Swire Investments Ltd; Wah Dak Services Ltd and Cheung Wah Bank Ltd; Gould and Gould[8] ("Swire Investments") provides an example of the types of dealings which could be carried out between a party and an alter-ego which could defeat a claim by a spouse. The wife in that case used the provisions of s. 85 to seek to set aside many transactions she claimed would defeat an anticipated order to be made in property proceedings she had commenced against the husband following their separation in August 1991. The wife contended that many transactions complained of were either shams or were with the alter egos of or entities controlled by the husband either directly or indirectly.

In a proper case, s. 85 is the vehicle to use to seek to restore the "status quo" of property. However, if the third party is not the vehicle of the "debtor" spouse and is a "*bona fide* purchaser or other person interested" the Court is required to have regard to the interests of that party under the provisions of s. 85(3). It seems clear that the provisions of s. 85(3) are likely to be used to ensure that the *bona fide* purchaser or other person interested is protected, by the Court attacking the remaining assets in the hands of the debtor spouse to satisfy the claim of the "innocent" spouse, or by ensuring that the third party has recourse to such other assets rather than a particular asset *in specie.* The real problem arises if there are insufficient assets to satisfy both the non-debtor spouse's claims and the claims by the third party.

The next situation which often arises is the one in which the husband and the wife determine that the family property is better in their hands than in the hands of the creditors. An arrangement is then structured whereby one party retains the bulk of the assets and the other retains the bulk of the debts. The party who retains the bulk of the debts is normally declared bankrupt shortly after the orders are made[9]. Most such arrangements should fail –

(a) If the existence of third party debts is disclosed to the Court it would be unlikely to either approve the arrangement or to make declarations which would prejudice third party rights without the third party being heard[10] ;

[8] (1993) F.L.C. 92-434
[9] See *Donovan and Donovan; Official Trustee in Bankruptcy* (1992) F.L.C. 92-276; *Official Trustee in Bankruptcy v. Donovan and Stevens* (1995) F.L.C. 92- 596; *Re Chemaisse*; *F.C. of T (intervener)* (1990) F.L.C. 92-133.
[10] *Lanceley and Lanceley* (1994) F.L.C. 92-491

(b) If the third party rights were not disclosed to the Court the orders would be set aside at a later date on the third party's application on the basis that it is a fundamental duty of the parties to provide a full and frank disclosure of third party interests to the Court and a failure to do so will almost inevitably lead to the orders being set aside on the basis of a miscarriage of justice[11].

Third party rights are not clothed in cotton wool. The Court has made orders which affect the interests of *bona fide* third parties under s. 85, under the former s. 120 of the *Matrimonial Causes Act*, and under State legislation. Fogarty J in *Swire Investments* concluded:

- The power of courts exercising divorce and matrimonial causes jurisdiction to make orders of the type in question either through the equivalent of s. 85 or by use of their injunctive powers is long standing;

- The power to do so has expanded in recent times paralleling the increasing availability of trusts and corporate structures which accentuate the problems to which s. 85 is part directed;

- Where the balance is to be drawn between the interests of the parties to the marriage and third parties has varied from time to time within legislative history; and

- Where the balance is to be drawn is a matter of policy choice rather than a question of power.

Relief under s. 85 is not confined to claims against third parties which may be the alter ego of one of the parties, nor is it confined to transactions which are shams[12]. It extends to transactions which are arms length and which are also genuine. It would follow from the terms of s. 85 itself that transactions which are not arms length will be examined very closely with regard to the protection which should be afforded to any third parties and with regard to the *bona fides* of any third party. Transactions which are not *bona fide* will not likely be afforded protection.

[11] *Official Trustee in Bankruptcy v. Donovan and Stevens* (1995) F.L.C. 92-596
[12] (1995) F.L.C. 92-596 at 80,442

The powers of the Court under s. 85 are not limited to simply setting aside the "offending" transaction. The powers extend to the making to such further orders as are ancillary to or necessary to give effect to the primary order[13].

An attempt to avoid the priority of a creditor was central to the issue argued in *Re: Chemaisse; F.C. of T.* (intervener)[14]. The husband was found to have been fraudulent and the wife to have colluded in that fraud when the parties entered into and sought approval of a s. 87 Deed transferring to the wife a three-quarter interest in the matrimonial home –without mentioning in the material that the Commissioner for Taxation claimed the sum of $355,000.00 from the husband or that a Mareva injunction had issued against the husband to restrain the disposition of assets by him. The Commissioner for Taxation was granted leave to intervene, the approval of the Deed was revoked and the wife was ordered to reconvey to the Commissioner the three quarter interest in the home.

It may be appropriate for the claim by a third party (or in appropriate cases for the jurisdictional basis of a claim against a third party) to be determined as a preliminary issue, but equally, there may be cases where it is impractical for such acclaim to be decided as a preliminary issue[15].

The claim of a spouse vis-à-vis the third party creditor is a question of balance. Lindenmayer J. wrote:

> *"The most important concepts here are those of necessity and balance. It would appear unfair that a spouse who has been employed over a long period in home duties should be arbitrarily relegated to a position of priority below that of the unsecured creditor to such an extent that his or her claim under s. 79 oaf the Act is diminished or even extinguished altogether. Similarly, spouses who allow the property of the marriage to be maintained in the sole name of their partner often find themselves to be the victims of what has become known colloquially as "sexually transmitted debt" and are left in a position far worse than those who hold joint legal title in the property. It seems unfortunate on the face of it then that mothers and wives should be forced to pay the price of what often are "the sins of the fathers". But the public policy argument is by no means so simply stated or one-sided.*

[13] *Davidson and Davison (No. 2*) (1994) FLC 92-469
[14] (1990) FLC 92-133
[15] Ibid at p. 80,448. See also *Re Ross Jones; Ex Parte Green* (1984) 156 CLR 185; (1984) FLC 91-555; *Empire Shipping Co Inc v. Owners of the Ship "Shin Kobe Maru"* (1991) 32 FCR 78 at 82-4

Balanced against the rights of the spouse is the fact that the Family Court has in the application of the basic rule, already shown a preparedness to assign liabilities to one party alone or to discount a liability altogether where appropriate. Neither can it be said that spouses are by any stretch of the imagination always "innocent" victims of their of their partner's dealings. Spouses have often enjoyed the pre-insolvency prosperity and lifestyle that their partner's business ventures have brought. Having previously received the benefits of such success, the so-called "roller coaster" principle dictates that they should thus be prepared to share in the "downs side" of such ventures"[16].

Fortunately, we do not have to consider the moral dilemma faced by the Court when we are acting for the "non debtor" spouse. We can afford the luxury of taking whatever legitimate steps are open to secure the property rights of such a spouse and to seek to avoid being infected by sexually transmitted debt.

There is no priority of creditors over the applicant in a property application or vice versa[17]. If, after all the claims against a spouse (including any proceedings under s. 79) have been determined in an orderly way in the appropriate Courts, that person is unable to meet his or her liabilities and is insolvent, then the competing rights of the creditors are to be determined in accordance with the laws of bankruptcy[18].

If there are insufficient assets to meet the non-debtor spouse's claim and the legitimate claim of a creditor then one or more must miss out. In applications under s. 79 of the *Family Law Act* 1975 it is usually the non-debtor spouse who will miss out – although the Court has recognised that may not always be the case[19]. Sometimes the Court will not make order which renders the non-debtor spouse's claim subservient to that of a creditor[20].

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[16] "A Question of Priorities: Wives or Unsecured Creditors" 6 AJFL 240 at 246
[17] *Re Chemaisse, F.C. of T (Intervener)* (1990) F.L.C. 92-133
[18] Ibid at p. 77,916
[19] See *Re Q (Damages for Sexual Assault)* (1995) FLC 95-565 where the Court determined that considerations of justice and equity and public policy made it inappropriate to take into account the husband's liability to pay the daughter damages or costs in a way in which the amount to be received by the wife for property settlement would be diminished.
[20] See *AF Petersens and AF Petersens* (supra) at 76,669 per Nygh J:

> "Nor, as has been pointed out earlier, is there anything in the decision of the High Court in *Ascot Investments Pty Ltd v. Harper and Harper* to suggest that this Court cannot make an order dividing the assets of the parties because such a division might hamper a third party in his or her chances of recovery of a debt".

The post-trial situation is one which, in my opinion, needs to be at the forefront of our consideration when obtaining orders. The situation will commonly arise when orders have been made in the Family Court of Australia in relation to an "estate" which involves property in the name of one of the parties which either is, or which is able to be, encumbered by that party. There are often situations in which property is held in the names of one or both parties subject to a mortgage or other registered security which authorises further advances. What, then, is the position of the non-debtor spouse vis-à-vis the creditor if, after the making of orders, one spouse further encumbers some of the property or, by use of the existing encumbrances, takes further advances? That situation arose in *Commonwealth Bank of Australia v. Staatz and Staatz*[21].

Orders were made in the first instance that the husband pay a sum to the wife within 12 months and in default certain parcels of land held in his name were to be sold. The wife was to be paid from the proceeds. The husband was restrained by injunction from encumbering the land to in excess of $75,000. The land was subject to mortgages in favour of the Bank which had been given 16 and 20 years earlier as security for loans to the husband and the wife for accommodation for a partnership they had been in. After the orders and prior to the wife notifying the bank of the terms of the orders, the bank advanced further money to the husband. The bank was aware of the divorce and that a property settlement had been ordered but was not aware of the full extent of the orders. The wife sought an order under s. 85 setting aside the further advances to the extent they exceeded $75,000. Her application was successful in the first instance but on appeal by the bank the orders under s. 85 were set aside.

The Full Court held that the transaction or transactions were normal commercial transactions and that as the Bank had not been given notice of the original order it was the wife who should suffer in the contest between the two innocent parties as she had the power to notify the bank of the original order. The Full Court held that the wife was always in a position to give notice to the Bank by serving a copy of the order on it and, that the wife could have lodged a caveat against the land – albeit expressly not deciding the question whether the

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Cited with approval in *Biltoft and Biltoft* (1995) FLC 92-614. See also the citation from *Hannah and Hannah*; *Tozer and Tozer* (1989) FLC 92-052 at 77,597 at page 82-127-8 in *Biltoft* (supra).

In *Kocijan* (deceased) and *Kocigan; Eustace (first intervener) and DFC of T (second intervener)* (1991) FLC 92-230 the Court determined that it should determine the wife's application under s. 79 and then an application for the administration of the estate of the deceased husband in order that the wife have a debt which she could prove in the husband's estate.

[21] (1988) F.L.C. 92-942

order created an interest in the land. In my opinion the wife could not have lodged a caveat against the land. She had no interest in the land.

The position in Queensland, under the *Land Title Act* 1994 is now more favourable to the wife than it was in 1988. If an order is made restraining a spouse from dealing with and then that order constitutes grounds to lodge a caveat[22]. Provided an office copy of the order is deposited when the caveat is lodged then the caveat will not lapse under s. 126[23].

Although the head note records that the advances by the bank were not "the making of a disposition" by the husband, on my reading of the decision, it appears that whilst the Full Court favoured that view, it declined to determine that question[24].

The questions remains, what if the property was not real property? What steps can a spouse who has the benefit of an order take to protect his or her position against a third party who may take an interest in such property at the behest of the other party.

In my opinion it is incumbent on practitioners, when orders envisage payment at a later stage, to ensure that an equity is created in the property in favour of the non-debtor spouse sufficient:

(a) in the case of real property, to enable a caveat to be lodged (or in such case an injunction restraining the debtor spouse from dealing with the property sufficient to enable a caveat to be lodged);
(b) in the case of property in relation to which there is no register of title, so that any subsequent person dealing with the property takes subject to the prior equity in favour of the non-debtor spouse (e.g., at least an order charging property until the satisfaction of the orders).

Any determination made by the Court in proceedings between the parties to a marriage inter se in relation to the rights of third parties is not binding on the third party unless the third party has intervened or has otherwise submitted to the jurisdiction of the Court[25].

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[22] S. 122(1)(e)
[23] See s. 126(1)(c)
[24] For further reading, see *Stibbles & Anor v. Highfern Pty Ltd* (Unreported, High Court of Australia, 23 December 1987)
[25] *Prince and Prince General Credits Australia Limited (Intervener); A-G for the State of Queensland (Intervening); A-G for the Commonwealth of Australia (Intervening)* (1984) F.L.C. 91-501

The procedure to join third parties as respondents to Family Court proceedings is to name that party or those parties as additional respondents in the proceeding and set out the nature of the relief sought against them and the basis for it in the ordinary way in the application[26]. It is a fundamental tenet of our system of justice that a person whose rights may be affected is given proper notice of any application which may affect that right and an opportunity to be heard[27]. A creditor affected by an order made without being given notice or an opportunity to be heard may apply under s. 79A to set aside the order[28].

The question then is, how can the non-debtor spouse avoid the risk of a third party liability being taken into account by the Court and then being compelled to share in an estate of much lower net value?

Hodges Hall v. Jovanovic and Markov[29] is an example of the type of situation to which this paper is specifically addressed. In that case the husband retained solicitors for the purposes of his matrimonial proceedings. He signed a retainer agreement which included a provision that charged his interest in the real property with the solicitors' fees and disbursements. The solicitors relied on the retainer letter to lodge a caveat against the husband's interest in the land. The husband later dispensed with the solicitors' services and acted for himself. At trial Butler J., *inter alia*, ordered the sale of the land and that the whole of the proceeds of sale be paid to the wife. The solicitors appealed on the basis, inter alia, that they had not been given proper notice of the application and had not appeared at the hearing. The Full Court later made orders which enabled the husband's solicitors to obtain payment of the sum of $10,000 from the proceeds of sale, however, it must be noted that there was sufficient equity for that sum to be satisfied from the husband's share and so, unfortunately, no real issue arose or was determined as to the competing interests of the wife and the husband's solicitors to any part of the proceeds. It is likely that the husband's former solicitors' costs would not have been afforded priority against the wife on ordinary principles[30] but an interesting argument would have resulted if the debt of the husband had become a secured debt through the charge[31].

The real danger arises between the non-debtor spouse and a third party creditor for value without notice. Any third party transaction which is a sham or involving a third party in

[26] See also *Hodges Hall v. Jovanovic and Markov* (1995) F.L.C. 92-611 at 82,093
[27] See also *Official Trustee in Bankruptcy v. Donovan and Donovan and Stevens* (1996) F.L.C. 92-703 and the cases cited at 83,421 col 1
[28] *Official Trustee in Bankruptcy v. Donovan and Donovan and Stevens* (1996) F.L.C. 92-703 at 83,423
[29] (1995) F.L.C. 92-611
[30] *Gould and Gould* (1996) F.L.C. 92-657
[31] See *Pauly v. Power & Power* (1994) F.L.C. 92.-458

collusion with the debtor spouse will not prevail and, in my opinion, the non-debtor spouse should recover the property transferred from the third party – both under general law principles and under s. 85 of the *Family Law Act* 1975[32].

Avoid Competition with the Third Party Creditor

Difficulties might be overcome by use of s. 78 of the *Family Law Act* 1975. Seeking a declaration as to the respective rights of the applicant spouse to particular property or properties may circumvent third party claims at least insofar as that particular property is concerned, provided other equitable considerations can be overcome – such as priorities. An applicant spouse can seek a declaration that property apparently in the hands of the debtor spouse is in fact beneficially owned either in whole or in part by the applicant or held on trust for the applicant either alone or in shares with the respondent.

Provided that the proceedings are between the parties to a marriage with respect to the property of the parties to the marriage or either of them and arise out of the marital relationship or are in relation to concurrent pending or completed proceedings for principal relief then jurisdiction rests in the Family Court of Australia[33].

Section 78 enables the Court to declare the title or rights of a party with respect to property – it does not allow the Court to alter those rights. To alter the rights of the parties the application will have to be made under s. 79. The Court has power to consider all issues of law and equity relevant to the determination of the parties' title and rights in relation to property[34]. It should be noted that once an application has been made for a declaration under s. 78, there is no impediment to the other party applying for an order under s. 79 or indeed, in appropriate cases, under s. 44(3). In *Good and Good*[35] the Full Court held that it would not be an "institution of proceedings"(within the meaning of s. 44(3)) to cross-apply or to amend a pleading to apply for orders under s. 79 in response to an application under s. 78. Therefore, the practitioner should be aware that a s. 78 application might "open the door" to s. 79 proceedings which otherwise might be out of time and in respect of which leave is

[32] See the discussion in *Twigg and Twigg v. Keady and Keady* (1996) F.L.C. 92-712 at 83,560-1 per Finn J. and also the discussion in Meagher, Gummow and Lehane *Equity: Doctrines and Remedies* (3 ed. Paras 846-860). See also the discussion by Kay J in *Twigg and Twigg v. Kealy and Kealy* (supra) at 83,575-6.
[33] *Family Law Act* 1975, s. 4(1) "matrimonial cause" para. (ca)(i)
[34] *Good and Good* (1982) F.L.C. 91-249
[35] (1982) F.L.C. 91-249 at 77,377 column 1

required under s. 44(3). The Full Court discouraged the use of s. 78 alone and stated that very few cases could be satisfactorily determined under s. 78[36].

The issue of an application under s. 78 will not enable the applicant to bring s. 79 proceedings – leave will still be required if out of time[37]. In *Smith and Smith*, Lindenmayer J cast doubt on the statement in *Good and Good*[38] above noting that there had been legislative changes since that decision and also noting that the statement was *obiter.*

The harm that may be perpetrated by the debtor spouse may be attacked through the use of s. 78 in order to claim an interest in property thus rendering that property unavailable to a third party creditor. The remedy probably will not work in relation to property in which a third party creditor may successfully claim an equitable or legal interest. There may be competing claims between the non-debtor spouse and the creditor which will have to be determined in accordance with the principles of equity. But there may be cases where that is preferable to the Court deducting the debt from the estate of the parties and leaving a smaller balance.

In *Matusewich and Matusewich*[39], Barblett J. made a declaration under s. 78 in circumstances where the husband had sold the former matrimonial home and used the proceeds to purchase a fishing boat. But for the lack of sufficient evidence, Barblett J. considered he could use the equitable doctrine of tracing to follow the wife's interest into the fishing boat. Difficulties may have been encountered if the boat was held in the name of a third party or in the names of the husband and a third party. Barblett J. also found the wife was entitled to interest from the date of the breach of trust[40]. He determined that the wife had "definable property" constituting a chose in action[41]. His Honour made a declaration of trust, and using the power to make consequential orders[42], converted the wife's interest into a money judgment for capital and interest and ordered the entire sum to be paid to the wife within a fixed period (allowing the husband a short time to raise the funds).

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[36] *Good and Good* (1982) F.L.C. 91-249 and *Catlin and Kent* (1987) FLC 91-815, in which the Full Court said that it would be impractical to consider the wife's application under s. 78 in isolation from evidence relating to the marriage relationship and to the separation. In that case the wife was given leave to institute proceedings under s. 79 over 30 years after the divorce!
[37] *Smith and Smith* (1991) F.L.C. 92-200
[38] (1991) F.L.C. 92-200
[39] (1978) F.L.C. 90-481
[40] *Wallersteiner and Moir (No. 2)* [1975] 1 QB 373
[41] *Spellman and Spellman* [1961] 2 All E.R. 498 and *Duff and Duff* (1977) FLC 90-217. "Chose in action" is defined as "*all personal rights of property which can be claimed or enforced by action, and not by taking physical possession*": Torkington and Magee *[1902] 2* K.B. *427*
[42] S. 78(2)

Balnaves and Balnaves; *Cummings (intervener)*[43] is an example of positioning required by a wife to retain an interest in some property in order to succeed in her claim at least to some extent.

The proceedings between husband and wife under ss 85 and 85A and under s. 79 were heard and determined in the Family Court between February and September 1987 (having been commenced in November 1985). In early 1986 the husband commenced living in a de facto relationship. The defacto wife applied for and was granted leave to intervene in the proceedings in November 1986. In July 1987 the husband was declared bankrupt. The Official Trustee in Bankruptcy was given leave to intervene on 15 July 1987.

It was held that the effect of the bankruptcy of the husband was to vest the property of the husband in the Official Trustee and, so long as the bankruptcy continued, there was no property of the husband in relation to which an order under s. 79 could relate. It was accepted that the wife's applications under ss 79 and 85A remained valid applications which could be renewed upon the husband's discharge from bankruptcy and that the wife's application under s. 78 continued independently of the husband's bankruptcy[44]. The Full Court agreed with those contentions – they were not disputed.

The trial continued to judgment in relation to the wife's applications under s. 85 (to set aside certain transactions she alleged were made which had the effect of defeating her orders) and under s. 78 (seeking declarations as to the respective entitlements of the parties to property)[45].

The Full Court held that questions, under s. 78, of legal and beneficial ownership of certain furniture had to be determined within "the established legal framework". Although the wife did not contribute to the furniture financially, she sought to establish that the husband had gifted a half interest in the furniture to her. In order to succeed in that claim she had to establish delivery and an intention to make the gift to her. The wife sought to have the Court

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[43] (1988) F.L.C. 91-952

[44] See also *Re Twigg; ex parte Twigg and Official Receiver* (1979) 25 A.L.R. 207; *Wallmann and Wallmann* (1982) F.L.C. 91-204; *Holley and Holley* (1982) F.L.C. 91-257; cf *Page and Page (No. 2*) (1982) F.L.C. 91-241

[45] Note that the wife's application under s. 78 went too far in that case. One of the declarations she sought was that a company held an interest in certain land as trustee for a trust. The Full Court held that the terms of . 78 itself precluded that application – it is confined to declarations relating to the title or rights of a party in relation to property.
It was argued on behalf of the wife that the Court could make the declaration under its accrued or pendent jurisdiction. That submission was rejected although the Court declined to determine the extent to which the jurisdiction of the Family Court of Australia in its accrued or pendent jurisdiction is curtailed by s. 78 or whether the cross-vesting legislation would make a difference.

conclude there was a gift by inference from the conduct of the husband evidenced from (a) the relationship of married persons and (b) the joint use of the items as part of a domestic relationship. Her case was summarised by the Full Court in its judgment as a claim "that there was a presumption of an intention to jointly benefit arising from those circumstances alone"[46]. The Full Court determined that by itself those two factors would not enable the wife to succeed, but combined with other factors – joint insurance, representations of joint ownership and a schedule of antiques prepared in joint names – those matters were strong indicia of representations by the husband to the outside world that the items which were jointly used, were jointly owned. The Full Court reversed the trial Judge's decision against the wife on the point and made the declarations sought.

Balnaves is a working example of the tools which might be employed using s. 78 and equitable principles to establish a claim to property in the hands of the other spouse thus "side-stepping" the third party creditor or other claimant to the estate of the other spouse.

Hendler and Hendler; Moore[47] also provides an example of an application based on s. 78 in lieu of s. 79. The parties married in 1977. In 1990 and 91 the husband received substantial superannuation payments which he deposited into accounts in his sole name. The wife later discovered that he had withdrawn substantial amounts from the accounts and left the home. The wife obtained ex parte injunctions restraining the husband from dealing with the two accounts. Upon the wife leaving the home the husband (unknown to the wife) withdrew most of the remainder and the same day gave the same amount of money to his brother who, in turn, purchased a mobile home. The brother was ultimately restrained from dealing with the mobile home and a declaration was made (purporting to be under s. 78) that the brother held certain money on trust for the husband. He appealed contending the trial Judge had no jurisdiction to make the order as it was between a party to a marriage on one side and a non-party on the other side. The Full Court determined that the trial Judge should not have made the declaration but avoided tackling, head-on, whether there was power under s. 78 or under "another base of jurisdiction" to make a determination of property holding between a party to a marriage and a third party. On appeal the wife sought to amend her application to seek to set aside the transaction under s. 85. The amendment was allowed and the transaction in favour of the brother was set aside.

[46] (1988) F.L.C. 91-952 at p 76,882
[47] (1988) F.L.C. 91-952 at p 76,882

In *Moran and Moran*[48]*,* Bulley J. held (on a preliminary application to strike out the s. 78 claim) the Court had power to make a declaration under s. 78 if it is alleged that a transaction by which property is transferred to a third party is a sham transaction[49]. Bulley J accepted a submission that the wife sought a declaration only between husband and wife, and did not seek any orders against the interest of the husband in the property itself. The husband's interest in the property (if declared to exist) was to be regarded as a financial resource only so that it would increase an entitlement of the wife in the "other" property against the husband. The declaration would not be binding against a third party who was not a party to the proceedings[50].

It is not possible to seek a declaration under s. 78 to declare the interest of a spouse in the property of the other spouse who is already bankrupt. From the date of bankruptcy, the whole of the estate of the spouse is vested in the Official Trustee in Bankruptcy. Therefore there is no existing title or rights in respect of property to which s. 78 can have application[51]. That difficulty can be overcome by seeking to rely on the common law jurisdiction of the State Courts and, provided there is sufficient nexus and proceedings in the Family Court of Australia, rely on the cross vesting legislation[52] or by making an application under s. 30 of the *Bankruptcy Act.*

The arsenal of remedies available to the non-debtor spouse

An application under s. 78 can employ an array of remedies. The most common methods of seeking to establish an interest in property (real or personal) are by seeking declarations of contract (express or implied)[53], partnership, trust (express or implied[54]), quantum meruit, promissory estoppel, unjust enrichment and restitution, and proprietary estoppel.

The High Court of Australia considered the position of de facto partners and their claims to property by way of resulting and constructive trusts in three recent cases, namely *Calverley v.*

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[48] (1995) F.L.C. 92-559

[49] "*Until or unless the Court rejects this "sham" allegation (for example, after a trial of the issue) then the power remains extant*": supra p. 81,583.

[50] *Lanceley and Lanceley* (1994) F.L.C. 92-491

[51] *Garmonsway and Garmonsway* (1986) F.L.C. 91-746

[52] *Kozma and Kozma* (1993) F.L.C. 92-337; *Canik and Canik*; *Ceylan*; *Oakley Thompson & Co* (1995) F.L.C. 92-589

[53] A claim in contract may be difficult bearing in mind the tendency of the Courts to regard family arrangements as not having the required intention to constitute a binding and enforceable contract. See *Riches v. Hogben* [1986] QdR 315; *Merritt v. Merritt* [1970] 1 W.L.R. 1211, at 1213 "*Would reasonable people regard the agreement as intended to be binding*" Per Lord Denning MR

[54] Implied trusts may be resulting or constructive trusts

Green[55], *Muschinsky v. Dodds*[56] and *Baumgartner v. Baumgartner*[57]. The principles established (or highlighted) by the trilogy of cases establishes the following:-

1. Where two or more persons contribute to the purchase of a property which is conveyed to them in their joint names, the equitable presumption is that they hold the legal estate in trust for themselves as tenants in common in shares proportionate to their contributions, unless the contributions are equal in which case they hold in equal shares.

2. Where, on a purchase, a property is conveyed to two persons, whet her as joint tenants or as tenants in common, and one of those persons has provided the whole of the purchase money, the property is presumed to be held in trust for that person (a resulting trust).

3. A resulting trust will not arise if the relationship between the real purchaser and the other transferee is such as to raise a presumption that the transfer was intended as an advancement, or in other words, a presumption that the transferee who had not contributed any of the purchase money was intended to take a beneficial interest.

4. No presumption of advancement arises where a man puts property into the name of a woman with whom he is living in a de facto relationship. There is no presumption arising where a woman puts property into the name of her de facto husband. Note, however, that a presumption of advancement will arise between spouses.

5. The presumption that there is a resulting trust may be rebutted by evidence that in fact the real purchaser intended that the other transferee should take a beneficial interest.

6. The presumption of a resulting trust operates by reference to the presumed intention of the party whose contribution exceeds his or her proportionate share but will prevail over the actual intention of that party established by the overall evidence including the evidence of the parties' respective contributions.

[55] (1984) 155 CLR 242
[56] (1984-85) 160 CLR 583
[57] (1987) 164 CLR 137

7. Where both transferees have contributed to the purchase price, the intentions of both are material, but where only one has provided the money it is his or her intention alone that has to be ascertained.

8. The evidence admissible to establish the intention of the "real" purchaser will comprise the acts and declarations of the parties before or at the time of purchase or so immediately thereafter as to constitute a part of the transaction.

9. The "real" purchaser may testify as to the intention which he or she had at the relevant time.

10. Subsequent declarations will be admissible as evidence against the party who made them and not in his or her favour.

11. Where the balance of a purchase price is raised on a mortgage under which both parties are liable to the mortgagee that fact constitutes a contribution by each to the price. An arrangement between them that one only will make the repayments does not establish that that person only provided the whole of the price.

12. If there is no agreement made after the purchase of the property to alter the equitable interests acquired when the property was purchased then the payments by one under the mortgage works no alteration of those interests. (The payer may claim back a proportionate share of outgoings using the doctrine of contribution.)

13. A constructive trust will arise regardless of intention. Its rationale is found essentially in its remedial function. It may be imposed regardless of actual or presumed agreement or intention to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle (unconscionable).

14. Notions of fairness and justice are relevant to the concept of "unconscionable conduct" as it underlies fundamental equitable concepts and doctrines including the constructive trust, but a constructive trust will not be imposed in accordance with idiosyncratic notions of what is just and fair.

15. In determining if there should be a constructive trust and, if so, the proportions thereof, the Court cannot disregard legal and equitable rights and simply do what is fair.

16. A refusal to recognise the existence of an equitable interest may amount to unconscionable conduct and the constructive trust can be imposed as a remedy to circumvent that unconscionable conduct.

17. A constructive trust may be imposed in a case where the "sub-stratum of a joint relationship or endeavour" is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specifically provided that that other party should so enjoy it. Equity will not permit that other party to assert a right to retain the benefit of the relevant property to the extent that it would be unconscionable for him or her so to do.

18. Equity favours equality and, in circumstances where the parties have lived together for years and have pooled their resources and their efforts to create a joint home, there is much to be said for the view that they should share the beneficial ownership equally as tenants in common – subject to adjustment to avoid any injustice which would result if account were not taken of the disparity between the worth of the their individual contributions, either financially or in kind.

19. As between the title holders the principle of law and equity which obliges them to bear the burden equally applies with the consequence that if one discharges more than his or her proper share he or she can call upon the other for contribution.

20. The party entitled to a contribution from the other would have an equitable charge upon the other's interest for such amount.

21. The extent to which the principle of equity that the parties be proportionately repaid their respective contributions, operates to qualify legal entitlement only to the extent to which it positively appears that it would be unconscionable for one party to assert or retain the benefit of property contributed by the other.

Tory v. Jones[58] contains a summary of the law, including a statement of the law relating to "proprietary estoppel". A more extensive exposition including an analysis of the rights and liabilities inter se of co-owners is contained in *Lipman and Lipman*[59].

A constructive trust may be used to seek recognition of contributions which are not directly applied to an asset but are directed elsewhere and which thereby enable the other party to apply funds to the asset[60].

Contributions may be financial or in kind or "in a variety of other ways[61]". It is possible, under a claim for a constructive trust, to bring into account contributions made other than in financial form[62]. It is also possible to argue that the "joint endeavour" to which a contribution is made is wider than a particular parcel or item of property but extends to all property of the parties and either of them. A claim is not as likely to succeed if no link is demonstrated between a contribution made and the item of property – the link may not need to be direct or substantial but it follows that the more direct and the more substantial a link, the better the prospects of success[63].

Miller v. Sutherland[64] is an example in which the Court imposed a constructive trust based on labour contributions - "a pooling of labour by or on behalf of both parties".

In *Woodward v. Johnston*[65], Cooper J., in the Supreme Court of Queensland, found the plaintiff worked for the defendant in the belief that she would obtain an interest in his business and that work, together with work she performed in relation to rental properties

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[58] (1990) D.F.C. 95-095

[59] (1989-90) 13 Fam L.R. 1 at 18-20. See also pp 20-21 for a discussion of the terms "constructive trust" and "proprietary estoppel".

[60] See *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685 at 706 per Mahoney J.A. approved *in Baumgartner v. Baumgartner* at 147

[61] See *Marks v. Burles* (1994) D.F.C. 95-152

[62] The High Court of Australia made it clear that contributions need not be financial in *Baumgartner v. Baumgartner* (supra) at 149: "*Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and making of their home, were on the basis of, and for the purposes of, that joint relationship".*

[63] See *Stowe and Deveraux Holdings Pty Ltd v. Stowe* (1995) 19 Fam. L.R. 409. A "blanket claim" to all the property of the defendant was struck out on the basis that there was no common intention to share all the property of one of the spouses, there was no pooling involving all the property, and only particular properties were improved. Contributions to the general welfare of the family of the parties were improved. Contributions to the general welfare of the family of the parties (to the general benefit of the family or to the business activities carried on by them) could not give rise to a constructive trust over all the property. This was a decision of the Full Court of the Supreme Court of Western Australia.

[64] (1990) 14 Fam. L.R. 416

[65] (1991) 14 Fam. L.R. 828

owned by the defendant, founded a declaration that the defendant held the business (and the income produced by it) on a constructive trust for the plaintiff and the defendant in shares 10/90.

It was held that the plaintiff could succeed to obtain an interest in the business notwithstanding the business did not exist at the date the promise by the defendant was made[66].

In *Willetts v. Marks and Scram Investments Pty Ltd*[67]the plaintiff succeeded in his claim for a constructive trust based solely on labour performed on the grounds that it would be unconscionable to deny him an interest in properties he had worked (for 31 years) on the promise of his deceased de facto wife and he would share in any subsequent increase in value in her land.

There is no doubt, in my submission, that contributions other than those of a financial kind can be taken into account when determining whether a trust should be imputed[68]. In the judgment in *Baumgartner's* case[69], the High Court treated earnings foregone by the woman during a three month period during which she was having and caring for a child as a matter for which she should be credited. By implication, Pincus J.A. In *Turner v. Dunne* recognised the value of the homemaker contribution when he levelled criticism at a proposition that non-financial contributions should be ignored[70].

Under s. 78, it is open to an applicant spouse to make a claim for an interest in property, the legal title to which is held in the name of the other spouse, and to found that claim as a declaration for a constructive trust. If it is likely that in a quasi matrimonial relationship such a trust will be found then it is highly likely that in an actual matrimonial relationship of mutual dependence and a mutual expectation that the relationship would continue the Court will declare a constructive trust to exist. Financial and non-financial contributions should be

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[66] Ibid at p. 840, applying *Grant v. Edwards [1986] 1 Ch. 638; Austin v. Keele (1987) 61 A.L.J.R, 605; and Riches v. Hogben (*supra)

[67] (1994) D.F.C. 95-147

[68] See *Turner v. Dunne* (Court of Appeal of Queensland, C.A. 196/1995, 20 August 1996, unreported) in particular the judgment of Pincus J.A. at p. 5 and the judgment of McPherson J.A. at p. 2

[69] Supra at 150

[70] At p. 6, his Honour said: "*Also, if it matters, the other view would lead to some odd results: a de facto wife who paid, out of her salary, for necessary household help to the parties would be entitled to have that financial contribution to the relationship taken into account, whereas one who, to save money, did all the household work herself would have that contribution ignored. Similar considerations apply when one considers maintenance of a house and garden, which might be done "cost free" by one of the partners, or housekeeping and gardening services might be paid for."*

recognised. Non-financial contributions in the form of homemaker and parent contributions can also be recognised under that head. The Court may be reluctant to extend the recognition of non-financial contributions too far[71].

The High Court also examined "proprietary estoppel" and estoppel generally in *Walton's Stores (Interstate) v. Maher*[72] and *Commonwealth v. Verwayen*[73]. Equitable estoppel provides a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts on it to his detriment, seeks to resile from the promise. It provides a remedy which will achieve "the minimum equity to do justice". It is not designed to enforce the promise but in some circumstances that may be the minimum equity necessary[74]. The equitable remedy (as distinct from common law estoppel) of proprietary estoppel[75] creates rights between the parties which are enforceable when it is unconscionable for the party to insist on his or her strict legal rights[76]. It will be unconscionable for a party to insist on his or her strict legal rights if that party has induced the other party to assume that a different legal relationship exists or will exist between them, if he or she knew the other party would, as a result, act or refrain from acting on that assumption and if, as a result, the other party will suffer a detriment unless the assumption is maintained. Once the detriment has ceased or been paid for, there is nothing unconscionable

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[71] Macrossan CJ in *Turner v. Dunne* (supra) at p. 2 of his judgment said:
"While it is true that "general notions of fairness and unconscionable conduct"(Baumgartner at 148) "unconscionability" is not a description automatically attracted whenever there is detected by a judge some departure from what he sees as a broad principle of fairness: cf the dismissible reference to idiosyncratic notions of what is just and fair: in Baumgartner (supra) at 148. If it were otherwise, it might have to be concluded that ordinary categories of legal ownership could be not much more than provisional in all relationships. Great uncertainty would result from the adoption of such a viewpoint and considerable expense would be involved in resolving it. A broad principle of community of property is not automatically imposed upon domestic relationships even where both parties contribute financially to the expenses involved in their relationships. The relevant unconscionability which has been referred to must always be found as a basis for the Court's intervention if the parties' separate titles are to be modified".

[72] (1988) 164 C.L.R. 387

[73] (1990) 170 C.L.R. 394

[74] *The Commonwealth v. Verwayen* (1990) 170 C.L.R. 394 at 428-9 per Brennan J

[75] "Equitable estoppel operates so as to compel adherence to an assumption as to rights. Sometimes that adherence can only be compelled by the recognition of an equitable entitlement to a positive right in the person claiming the benefit of an estoppel and the enforcement of correlative duties on the part of the person against who the estoppel is successfully raised. .. Where equity compels adherence to an assumption in this manner, the resulting estoppel is generally referred to as "proprietary estoppel". On other occasions adherence to an assumption as to rights may be compelled by precluding the person estopped from asserting existing rights. It is in this manner that "promissory estoppel" has generally operated. .. Other estoppels may operate in the same way." per Gaudron J.

[76] *The Commonwealth v. Verwayen* supra, per McHugh J. at 500

in a party insisting on reverting to his or her former relationship with the other party and enforcing his or her strict legal rights[77].

Brennan J. in *Walton's Stores (Interstate) Ltd v. Maher*[78] set out the elements necessary to establish equitable estoppel as follows:

1. that the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them, and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship;
2. the defendant has induced the plaintiff to adopt that submission or expectation (a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs);
3. the plaintiff acts or abstains from acting in reliance on the assumption or expectation;
4. the defendant knew or intended him to do so;
5. the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and
6. the defendant has failed to act or avoid the detriment whether by fulfilling the assumption or expectation or otherwise.

The date from which the interest takes effect

An equitable remedy, or any other remedy, will be of the most benefit to the non-debtor spouse if the interest claimed in the property is declared to take effect from the acquisition of the property or at some other early date, as opposed to taking effect from the date of the declaration. A creditor will be less likely to be able to effect or take property beneficially owned at the date of the debt. The choice of remedy may affect the date upon which the claimant's right or interest is deemed to have come about. This can be a critically important

[77] *The Commonwealth v. Verwayen* supra, peat 501 per McHugh J.
[78] (1988) 164 C.L.R. 387 at 428-9

issue – for example, in order to defeat a subsequent claim or to preserve some property in the event of an intervening or an imminent bankruptcy.

A resulting trust arises on the basis of contribution. It therefore recognises a proprietary interest at the point of the acquisition of the property (i.e. the contribution) rather than the point of declaration[79]. It should be noted that a liability under a mortgage will constitute a contribution. If the spouse has not, in fact, made payments under the mortgage then those payments can be reclaimed by the other on the basis of an equitable liability of co-owners to contribute. Considerations of off-setting an occupation rent[80] may be taken into account if a claim is made for contributions to the mortgage.

A constructive trust may arise at the time of acquisition and may also arise at the time of judicial declaration. There are various types of constructive trust and it is important to distinguish the types as they may "crystallise" the interest of the beneficiary at different times. I intend to examine the constructive trust based on contribution and the constructive trust based on common intention[81].

A constructive trust based on common intention has been regarded as akin to an express trust. Thus, it would follow, the interest would arise at the time of the formation of the common intention. An alternative view is that the constructive trust based on common intention is based on proprietary estoppel. There is uncertainty about whether the interest arises prior to court order[82] or declaration. It is ultimately my view that the interest will only arise in Australia on the judicial declaration.

Deane J. recognised that a constructive trust based on contribution may arise at different times in *Muschinsky v. Dodds*[83]. The dilemma arises because, on the one hand, a constructive trust is recognised as existing prior to a judicial declaration, and on the other hand it is also recognised as being of a remedial nature[84].

Deane *J., discussed the constructive trust in Muschinsky v. Dodds*[85] *and, inter alia said:*

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[79] *Calverley v. Green* (1984) 155 C.L.R. 242 at 252, and at 262; cited in *Re Sabri; ex parte Brien* (1997) FLC 92 - 732
[80] See *Calverley v. Green* (1984) 155 C.L.R. 242 per Gibbs J
[81] See Patrick Parkinson: "Property Rights and Third Party Creditors – the Scope and Limitations of Equitable Doctrines", 7th National Family Law Conference, Canberra, Oct 1996
[82] *Plimmer v. Mayor of Wellington* (1884) 9 App. Cas. 699
[83] (1985) 160 C.L.R. 583 at 613-614, 615
[84] See the discussion in *Re Sabri; ex parte Brien* (1997) FLC 92-732 per Chisolm J. at 83,863 *et seq.*
[85] (1984-85) 160 C.L.R. 583 at 615

> *"The use or trust of equity, like equity itself, was essentially remedial in its origins. In its basic form it was imposed, as a personal obligation attaching to property, to enforce the equitable principle that a legal owner should not be permitted to use his common aw rights as owner to abuse or subvert the intention which underlay his acquisition and possession of those rights.*
>
> *...*
>
> *The old maxim that equity regards as done that which ought to be done is as applicable to enforce equitable obligations as it is to create them and, notwithstanding that the constructive trust is remedial in both origin and nature, there does not need to have been a curial declaration or order before equity will recognise the prior existence of a constructive trust. .. where an equity court would retrospectively impose a constructive trust by way of equitable remedy, its availability as such a remedy provides the basis for, and governs the content of, its existence inter partes independently of any formal order declaring or enforcing it.*
>
> *...*
>
> ***.. in this country, at least, the constructive trust has not outgrown its formative stages as an equitable remedy and should still be seen as constituting an in personam remedy attaching to property** which may be moulded and adjusted to give effect to the application and inter-play of equitable principles in the circumstances of the particular case. In particular, where competing common law or equitable claims are or may be involved, **a declaration of constructive trust by way of remedy can properly be so framed that the consequences of its imposition are operative only from the date of judgment or formal court order or from some other specified date."***

Thus, it is possible to seek the declaration of a constructive trust which pre-dates the court order and equity will then recognise the prior existence of the constructive trust. Chisolm J., in *Re Sabri; ex parte Brien*[86], after reviewing authorities for[87] and against[88] the backdating of constructive trusts; concluded:

> *"Consistently with the flexibility indicated in the authorities in constructing an appropriate remedy in all the circumstances of the case, in my view it is open to a court, where justice and equity so require, to treat an interest arising under a constructive trust as dating from a time prior to the court proceedings."*

Pincus J., in *Re Osborne*[89] found a lack of unconscionable conduct on the part of the bankrupt prior to the transfer to be fatal to the declaration of a constructive trust so as to save the impugned transaction against the Trustee. In *Sabri*, Chisolm J. held that it was not fatal to a claim for a declaration of a constructive trust pre-dating the husband's bankruptcy that the wife could not point to unconscionable conduct prior to the date of the act of bankruptcy. He

[86] Supra at 83,867
[87] *Re Jonton Pty Lt*d [1992] 2 QdR. 105; *Kidner v. Secretary, Department of Social Security* (1993) 31 ALD 63
[88] *Re Osborne* (1989) 91 A.L.R. 135
[89] Supra

held that the important thing was that at that time the circumstances were already such that it would have been unconscionable for the husband to assert sole title to the property. In other words, it was not the fact of an unconscionable act but that if there had been any such act it would have then been unconscionable that was critical[90]. In addition, Chisolm J. considered that the rule in *Ex parte James*; *Re Condon*[91],[92] applied and that as the assets of the bankrupt husband had been enriched, the wife could not claim in the husband's bankruptcy, and it would be unfair for the trustee to rely on its strict legal rights, therefore the rule should be applied[93]. A similar proposition was recognised in *Corke v. Corke and the Official Trustee in Bankruptcy*[94], put in terms that the trustee in bankruptcy takes the property "clogged with all the equitable conditions which attach to it". An application for recognition of the wife's interest could be made, in the event of a bankruptcy, under s. 30(1) of the *Bankruptcy Act*. Such a declaration would be binding on the creditors.

It seems to me that two things follow: first, not only should we seek the declaration of a constructive trust (based on contribution), but we should be conscious of and seek that the trust be declared from an early date, if appropriate. Secondly, if we are unable to point to actual conduct which is "unconscionable conduct" on the part of the respondent at that early date, then we should establish that at an early date it would have been unconscionable for the respondent to have denied the applicant's interest in the property.

A constructive trust based on "common intention", if viewed as a form of express trust, will arise at the time the common intention is formed, or if viewed as a form of proprietary estoppel will arise at the time the contribution is made to the detriment of the person making the contribution – rather than at the time of the Court order, i.e. "it is binding as soon as it is acted upon to the detriment of the other party"[95]. That is not to say, however, that it will give rise to an equitable interest in the property at that time.

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[90] Supra at 83,867, and supported by *Kidner v. Dept of Social Security* (supra) per Drummond J. at 75-6

[91] (1874) 9 Ch.App. 609

[92] The rule provides that the Court of Bankruptcy (and therefore the Trustee in Bankruptcy as an officer of the Court) ought to act as honestly as other people. In consequence, if the Trustee comes into possession of property which in equity belongs to someone else, then the trustee should pay it to that other person.

[93] There are three conditions for the application of the rule as set out in *Re Clark (A Bankrupt); ex parte the Trustee v. Texaco Ltd* [1975] 1 W.L.R. 559 at 563-4 and cited with approval by Morling J. in *Re Ayoub; ex parte Silvia* (1983) 67 F.L.R. 144, 148. Note that Chisolm J. acknowledged that the rule had been more often distinguished than followed.

[94] (1994) 17 Fam.L.R. 698 at 705; cited in *Lanceley and Lanceley* (1994) F.L.C. 92-491 at 81,114

[95] *Commonwealth v. Verwayen* (1990) 170 C.L.R. 394 at 422 per Brennan J.

Proprietary estoppel is a form of equity created by estoppel[96]. Whilst the name implies a "proprietary" interest, in my opinion the interest or equity arises upon the declaration – not upon the satisfaction of the necessary elements. Such a state is consistent with the proposition that equity will do the minimum to do justice and the proposition that once the actions of the other are no longer unconscionable then the other party can insist on his or her strict legal rights. In some circumstances the remedy may require the recognition of an equitable charge[97] or lien[98] but it remains my opinion that proprietary estoppel does not recognise the creation of an interest in property at the time the elements are satisfied, it arises on the judicial declaration of such an interest if that is what is required to do to prevent detriment resulting from unconscionable conduct[99]. What arises is consistent with being a mere equity rather than an equitable interest. Thus, in my opinion, neither the constructive trust based on common intention nor proprietary estoppel provides an interest in property until the declaration. The Court may, however, declare the trust to arise at an early time.

A secured creditor will obtain priority over an equitable interest found in favour of a claimant spouse. The holder of a legal interest will take priority over an equitable interest. The importance of the date upon which the claimant's interest takes effect is understood in the context of the priorities of equitable interests. The priorities of the holders of two competing equitable interests will fall to be determined in accordance with well-known equitable principles. The first in time will have the prior claim – the priority may be lost by some conduct on the part of the first in time (some act or default which prejudices his claim) which must have contributed to the false assumption of the holder of the second upon which the second in time acted at the time the latter equity was created[100].

The Full Court of the Family Court in *Twigg and Twigg v. Keady and Keady*[101], in the context of determining the rights of a solicitor against the proceeds of a judgment which the wife in that case had assigned to a third party, concluded that a solicitor's equitable right to

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[96] *Walton's Stores (Interstate) Ltd v. Maher* supra per Brennan J at 419
[97] *Chalmers v. Padoe* [1963] 1 W.L.R. 677
[98] *Walton's Stores (Interstate) Ltd v. Maher* supra per Brennan J at 419
[99] Associate Professor Parkinson in "*Property Rights and Third Party Creditors – The Scope and Limitations of Equitable Doctrines*", Oct 1996, argues to the contrary. His view is that the line of authority on proprietary estoppel, *Plimmer v. Mayor of Wellington* (1884) 9 App Cas 699, *Hamilton v. Geraghty* (1901) 1 S.R. Eq. N.S.W. 81, *Carvill v. Carvill* (1984) F.L.C. 91-586 establishes that the estoppel gives rise to proprietary interest, the exact nature of which may not be discernible until the Court orders, but which is capable of disposition prior to such court order.
[100] *Rice v. Rice* (1854) 2 Drew. 73 [61 E.R. 646*]; Shropshire Union Railways & Canal Co. v. The Queen* (1875) L.R. 7 H.L. 496; *Lapin v. Abigail* (1930) 44 C.L.R. 166*; Abigail v. Lapin* [1934] A.C. 491; (1934) 51 C.L.R. 58; *Breskvar v. Wall* (1971) 126 C.L.R. 376
[101] (1996) F.L.C. 92-712

the proceeds of a judgment prevailed over the rights of a later assignee of the fund other than a bona fide purchaser for value and without notice. The statement in my opinion merely affirms the general law of priorities of equitable interests. The principles which the Court applied in relation to a solicitor's right to receive payment out of the proceeds of a judgment as against a third party should likewise be applied between a spouse and a third party.

Neutralising the debt

Before leaving this paper, I raise for consideration, but do not propose to address, some alternative remedies which may apply in favour of a non-debtor spouse. If the non-debtor spouse can attack the veracity of the debt claimed itself then the problem may also be eliminated.

You may need to consider applications for relief against credit contracts and securities taken under the Consumer Credit Code, or applications for relief against guarantees on the basis of the creditors conduct toward the principal debtor or in relation to the guarantor (if acting for a guarantor spouse); or attack the very formation of the obligation itself[102]. Further reading on this aspect can be found in an excellent paper under this title delivered by Tom Altobelli in Sydney on 30 April 1997[103].

Summary

In summary, it is not necessary to accept the division of the net estate between the parties as the total of the assets less the total of the liabilities. It may be that there are cases in which the liabilities can be challenged either *vis-a-vis* the creditor or *vis-a-vis* the other spouse. There may be appropriate cases in which it is of benefit to seek the declaration of the interest of the spouse under s. 78 of the *Family Law Act*1975 in lieu of relying on the traditional s. 79 approach.

Apart from seeking a declaration as to the existing rights or seeking orders for the partition and sale of property held in co-ownership[104], it is possible to seek orders inter se declaring the interests of the parties to a marriage in property and to seek a declaration that the property is held in propositions other than those reflected in the legal title.

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[102] *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 C.L.R. 447
[103] "*The Non-Debtor Spouse and Third Party Creditors*" Tom Altobelli, Principal. Werry Altobelli, Solicitors, LAAMS 30/4/97
[104] *Property Law Act* 1974, ss. 38 & 41 in relation to real property and chattels and personal property

It is possible to seek a declaration binding a third party but the declaration will only be binding if the third party joins in the proceedings. The third party should be named as an additional party in the proceedings and the nature of the relief sought against the third party and the basis for it should be set out in the ordinary way.

Applications for declarations can be useful if s. 79 proceedings are out of time and leave is not likely to be granted. They may be useful if there is a risk of imminent bankruptcy. The claim for a declaration survives the bankruptcy and can proceed whereas a s. 79 application survives but can only be heard when the bankrupt has been discharged and can only apply to any surplus estate.

Practitioners should be mindful of preserving the asset pool pending trial and also of protecting any orders obtained at trial pending the satisfaction of all orders by seeking a charge over assets until such time as an order is satisfied. In addition, or alternatively – depending on the circumstances – an injunction should be obtained to restrain a party from dealing with real property and a caveat should be lodged with a copy of the order to preserve real property interests.

Consideration should be had to attacking the debt owing to the third party itself – challenging a guarantee, mortgage, credit transaction and the like.

If all else fails then seek an order that the debt is one for which the other spouse should be solely responsible – preferably with indemnities and security if necessary.

In the event of a bankruptcy prior to the application being made, then an application under s. 30(1) of the *Bankrupty Act* should be considered.

Limitations

It is important to note that unless there is a "contradictor" the Court may decline to make the declaration sought. The Court is not <u>required</u> to make a declaration under s. 78 unless there is a <u>need</u> to determine an entitlement to property. If there is no issue between the parties in relation to the existing title then the Court will not make the declaration, particularly if the real intent of the declarations sought is directed to the

collateral issue of removing the interest in the property from the potential clutches of the creditors[105].

The focus of the exercise is to either negate the third party creditor's claim altogether or to insulate particular property or interests in property against attack from the third party creditor. In addition, attention can be focussed on bringing back into the pool, assets which have been disposed of to third parties without the consent of the non-debtor spouse. It is therefore doubly important to join any creditor affected by any such order – first to bind the creditor and second to secure a "contradictor".

[105] *Lanceley and Lanceley* (1994) F.L.C. 92-391