Murdoch v. Murdoch: Just about what the Ordinary Rancher's Wife Does

The decisions of the House of Lords in *Pettitt* v. *Pettitt*[1] and *Gissing* v. *Gissing*[2] provoked a great interest in the subject of family property.[3] Those cases left the common law in an unsatisfactory state firstly because they did not give a clear exposition of all applicable principles and secondly because the policy of rigid separation of property which the Law Lords were unwilling to bend ignored the partnership aspects of modern marriage. The Supreme Court of Canada had not ruled on the question since the 1961 decision in *Thompson* v. *Thompson*,[4] which preceded *Pettitt* and *Gissing* by almost ten years and which, while consistent with the rationale employed by the House of Lords, merely scratched the surface of the problems. A post-*Gissing* pronouncement by the Supreme Court should have been welcomed, but the recent decision in *Murdoch* v. *Murdoch*[5] aggravated the difficulties and the controversy which it produced may impel the provinces to legislate a solution.[6]

The facts of the *Murdoch* case are quite well known.[7] For the first four years after their marriage in 1943 the Murdochs worked on ranches in Alberta as a hired couple. In 1947 the husband acquired his first ranch property in that province and thereafter, through a progression of sales and purchases, acquired properties of increasing value culminating in a substantial homestead-ranch. After the marriage collapsed in 1968 Mrs Murdoch claimed a decree

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[1] [1970] A.C. 777.

[2] [1971] A.C. 886.

[3] The leading articles include: Lesser, *The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot*, (1973) 23 U. of T. L.J. 148; Brown, *English Law in Search of a Matrimonial Regime*, (1970-71) 4 Ottawa L.Rev. 331; Kahn-Freund, *Recent Legislation on Matrimonial Property*, (1970) 33 M.L.R. 601; Miller, *Family Assets*, (1970) 86 L.Q.R. 98.

[4] [1961] S.C.R. 3.

[5] (1974), 41 D.L.R. (3d) 367; [1974] 1 W.W.R. 361 (S.C.C.).

[6] The Ontario Law Reform Commission has made an exhaustive study of the entire field of family property law in Ontario and has recently produced its report. See *Ontario Law Reform Commission, Report on Family Law, Part IV, Family Property* (1974). (Hereinafter called *Report on Family Law.*)

[7] It has been the subject of extensive journalistic comment. See, *e.g.*, *Time*, 25 March 1974, Canadian notes, 6-7.

of judicial separation and a one-half interest in the ranch, the title to which was vested in the name of her husband. Her initial contention was that she and her husband were equal partners in the ranching business, but when the case reached the Supreme Court of Canada, on appeal from the Appellate Division of the Alberta Supreme Court, Mrs Murdoch abandoned the partnership claim. She submitted that there was a resulting trust in her favour for a one-half share in the property because she contributed either directly in cash or indirectly through labour to the successive acquisitions of property.

When *Murdoch* was litigated, certain clear principles of law could be distilled from the earlier cases. *Pettitt* and *Gissing* illustrated the primary rule: where one spouse claims a beneficial interest in property in which the legal title is vested in the other spouse then the party who asserts the existence of a beneficial interest must establish that the legal owner holds the property in trust for the claimant.[8] The same rule applies to disputes about beneficial ownership between strangers.[9] Section 17 of the English *Married Women's Property Act* [10] is procedural and does not entitle a court to vary existing property rights.[11] It follows that a court cannot make a discretionary division of "family assets".[12] This view of the law had already been accepted by the Supreme Court of Canada in *Thompson* [13] and the submission on behalf of Mrs

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[8] *Gissing* v. *Gissing*, [1971] A.C. 886 especially *per* Viscount Dilhorne at 900 and Lord Diplock at 904.

[9] *Gissing* v. *Gissing*, [1971] A.C. 886, 904-5 *per* Lord Diplock.

[10] 45 & 46 Vict., c.75. This section has been enacted in most of the Canadian Provinces. See, *e.g.*, *Married Women's Property Act*, R.S.O. 1970, c.262, s.12(1):

> In any question between husband and wife as to the title to or possession of property, either party... may apply in a summary way to a judge of the Supreme Court... and the judge may make such order... as he thinks fit....

There is no legislation equivalent to s.17 of the English *Married Women's Property Act* in Alberta, but in view of the propositions adopted in *Pettitt* and *Gissing* it is clear that the same substantive principles apply whether or not that section is enacted.

[11] *Pettitt* v. *Pettitt*, [1970] A.C. 777, 793 *per* Lord Reid, 798 *per* Lord Morris, 807-8 *per* Lord Hodson, 813 *per* Lord Upjohn, 820 *per* Lord Diplock.

[12] The contrary doctrine (that s.17 would permit the discretionary division of "family assets") was developed by the English Court of Appeal in a line of cases beginning with *Rimmer* v. *Rimmer*, [1953] 1 Q.B. 63, and including *Pettitt* v. *Pettitt* and *Gissing* v. *Gissing* and was never accepted in Canada. *Fribance* v. *Fribance*, [1957] 1 All E.R. 357. This approach was rejected in See f.n.13.

[13] *Thompson* v. *Thompson*, [1961] S.C.R. 3, 13-14 *per* Judson,J.

Murdoch that there was a resulting trust in her favour was simply an attempt to apply the rules adopted by the most authoritative courts in Canada and England.

There was thus no doubt that the issue in *Murdoch* was to be governed by the law of trust, but the judgments in *Pettitt, Gissing* and *Thompson* did not settle all the circumstances in which a court could find a resulting trust. It would appear that a claimant must establish that there was a common intention at the time of acquisition of the property that he or she was to have a beneficial interest.[14] A court can infer this intention from the conduct of the spouses and in particular from contributions to the purchase price by the claimant spouse.[15] But the problem is complicated by the fact that the modern land transaction is not completed by a simple cash payment. The purchase is usually made by the payment of an initial deposit followed by instalments for the balance of the price payable over an extended time period. The claimant's contribution to the purchase price might therefore be a direct cash payment toward the deposit or instalments, or an indirect contribution, "e.g. by paying household bills, so as to enable [the legal owner] to pay for the house".[16] A substantial direct cash contribution will provide a court with sufficient evidence to infer that the spouses intended it to carry a share in the property.[17] However, the position where only indirect contributions are made was

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[14] *Gissing* v. *Gissing*, [1971] A.C. 886, 898 *per* Lord Morris, 900 *per* Viscount Dilhorne, 905-6 *per* Lord Diplock. In *Pettitt* v. *Pettitt* some of the Lords indicated that the court may impute to the parties an intention which they did not in fact have, but which they would have had if they had thought about the matter: [1970] A.C. 777, 795 *per* Lord Reid, 816 *per* Lord Upjohn, 823 *per* Lord Diplock. However, in *Gissing* v. *Gissing* a majority of the members of the court stated that a "court cannot ascribe intentions which the parties in fact never had": [1971] A.C. 886, 898 *per* Lord Morris. *Cf.* also [1971] A.C. 886, 900 *per* Viscount Dilhorne, 904-06 *per* Lord Diplock. Lord Reid seemed to believe that a court can still impute such an intention: [1971] A.C. 886, 897. Lord Pearson noted that "imputed intent does not differ very much from an implied agreement": [1971] A.C. 886, 902. The doctrine that the court can infer the parties' common intention was accepted in *Murdoch* v. *Murdoch* (1974), 41 D.L.R. (3d) 367, 377 *per* Martland,J.

[15] *Gissing* v. *Gissing*, [1971] A.C. 886, 896 *per* Lord Reid, 900 *per* Viscount Dilhorne, 902 *per* Lord Pearson, 906 *per* Lord Diplock. But this is not to impute to the parties an intention which they did not have.

[16] *Gissing* v. *Gissing*, [1971] A.C. 886, 896 *per* Lord Reid.

[17] *Gissing* v. *Gissing*, [1971] A.C. 886 especially *per* Viscount Dilhorne at 900 and Lord Diplock at 907-8. *Thompson* v. *Thompson*, [1961] S.C.R. 3, 13-14. Of course, if the payment is made by the husband who takes title in the name of his wife he may be unable to rebut the presumption of advancement.

not resolved by *Gissing*[18] and received only passing mention in *Thompson*.[19]

To see how these principles were applied in *Murdoch*, one must look at its detailed facts. The first of the succession of properties which Mr Murdoch purchased was a dude ranch. He bought it in 1947 in partnership with his father, each of them contributing $3000. Martland,J., who wrote the majority judgment in which Judson, Ritchie and Spence,JJ. concurred, stated that Mr Murdoch paid his share of the price out of his own assets.[20] The sole dissenting judge, Laskin,J. (as he then was), noted that during the preceeding four years, when the Murdochs worked as a hired couple, their pay of $100 per month was received by the husband and part of his share of the price of the dude ranch came from those earnings.[21] The property was sold in 1951 and Mr Murdoch received $3,500 from the proceeds of sale.

In 1952 Mr Murdoch made a loan of $4,000 to one Sturrock in return for grazing rights but the source of these funds was disputed. Mrs Murdoch's father died during that year and left moneys to his wife. The latter then gave some of the money to Mrs Murdoch, who deposited it in a bank account in her own name. The funds for the Sturrock loan came out of that money but Mr Murdoch alleged that he borrowed the money from his wife's mother. He produced book entries in support of this argument and the trial judge found that "he understood and treated that money at all times as a loan made to him".[22]

Mr Murdoch's next acquisition was the Ward property, for which he paid $4,500. He contributed $2,500 from the proceeds of sale of the dude ranch, and the remaining $2,000 came from the estate moneys of Mrs Murdoch's father, which had been deposited in

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[18] There were statements both for and against the proposition that the requisite intent can be inferred from indirect contributions. See Lesser, *supra,* f.n.3, 193-4. The writer does not accept Lesser's conclusion that a majority of their Lordships believed that an indirect contribution could never give an interest in the property. See *infra,* at p. 316.

[19] [1961] S.C.R. 3, 14 *per* Judson,J. The Ontario Law Reform Commission observed that "there is much residual uncertainty concerning the precise nature of the contribution required to be made by a spouse to the matrimonial home as a condition precedent to establishing entitlement to a beneficial interest therein": cf. *Report on Family Law, supra,* f.n.6, 38. This remark is equally applicable to all items of family property.

[20] (1974), 41 D.L.R. (3d) 367, 369.

[21] (1974), 41 D.L.R. (3d) 367, 379. The judgments of Laskin and Martland,JJ. are marked by differences of opinion on both fact and law.

[22] (1974), 41 D.L.R. (3d) 367, 371.

her bank account. However, the trial judge found that, as with the Sturrock loan, Mr Murdoch treated it as a loan from his mother-in-law and not as a contribution from his wife.

The final transaction took place in 1958 and concerned the purchase of a ranch described as the Brockway property. This was the land in respect of which Mrs Murdoch claimed her one-half interest. Mr Murdoch paid $25,000 for it and also bought some farm machinery for $3,800. He paid a $6,200 deposit on the real estate and cash for the machinery. Both these sums came from the proceeds of sale of the Ward property and the repayment of the Sturrock loan. He agreed to pay the balance of the purchase price by instalments and duly made the payments.

In addition to the abovementioned cash contributions which Mrs Murdoch claimed to have made toward the eventual purchase of the Brockway property, she also relied upon the fact that during the marriage she had worked very hard in her husband's ranching business. She described the nature of her work as follows:

> Haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done. I worked outside with him, just as a man would... .[23]

Moreover, Mr Murdoch was absent from the properties for five months in every year on other business and he admitted that his wife looked after the ranches while he was away. Nevertheless, he thought that this was "just about what the ordinary rancher's wife does"[24] and that view of the facts was accepted by the trial judge.[25]

Thus there was evidence in the *Murdoch* case of both direct and indirect contributions. Mrs Murdoch's principal evidence of a direct cash payment was that she had paid $6,000 into the Sturrock loan and the Ward property and that these funds formed part of the deposit for the Brockway ranch. But the trial judge's finding of fact that Mr Murdoch treated the money as a loan nullified the attempt to infer from this payment a common intention to share ownership. Martland,J. accepted without question the trial judge's factual determination and the conclusion of law which followed from it.[26] Laskin,J.'s dissent was based mainly on

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[23] Excerpt from Mrs Murdoch's evidence in chief. See (1974), 41 D.L.R. (3d) 367, 380.

[24] Excerpt from Mr Murdoch's evidence in chief. See (1974), 41 D.L.R. (3d) 367, 380.

[25] (1974), 41 D.L.R. (3d) 367, 375-376, 380-381.

[26] (1974), 41 D.L.R. (3d) 367, 373.

other grounds and he did not take issue with this point, remarking only that "clarity could have been better served if this is intended as a finding that the money was a loan from the wife's mother".[27] It is settled law that where evidence establishes only a loan of money used for the purchase of property there is no resulting trust to the lender who has the status merely of a creditor.[28] The decision that no resulting trust arose from the wife's financial contribution was based not on this principle but on the impossibility of inferring a common intention to share ownership in the face of Mr Murdoch's belief that the funds were a loan.

This is logical reasoning but it simply underscores the inadequacy of analysing family property cases in terms of the general principles of property law which govern disputes between strangers. For example, Mr Murdoch's mother-in-law would not have lent the money to him if he were not married to Mrs Murdoch. Furthermore, Mrs Murdoch's mother would hardly have paid such a large sum of money to Mr Murdoch for a private benefit from which Mrs Murdoch was excluded. Martland,J.'s judgment should be compared with the decision of Lacourciere,J. in *Calder* v. *Cleland*,[29] where his Lordship gave special attention to the motivating factors in family finances. There the spouses sold the matrimonial home which they owned as joint tenants and the proceeds of sale were used in part for the purchase of a new home. The balance of the down payment was a gift from the husband's father, and in considering the nature of that contribution Lacourciere,J. said:

> ...it is natural to think that the defendant's father intended to benefit both his son and daughter-in-law, who lived harmoniously and were the parents of his grandsons... he may not have given explicit instructions as to title, but he clearly envisaged subsidizing the purchase of a new matrimonial home... .[30]

Since the trial judge in *Murdoch* did not hold that the money used in the Sturrock and Ward transactions was an actual loan, it was open to the Supreme Court to conclude that the money was either a contribution from Mrs Murdoch or, at least (as in *Calder* v. *Cleland*), a payment which was intended to benefit both husband and wife. Mr Murdoch's assertion that he did not treat the money as a contribution presented a hurdle for the Court but it could have held that a reasonable man in his position would have realized that the money was intended to benefit both spouses.

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[27] (1974), 41 D.L.R. (3d) 367, 382.
[28] Pettitt, *Equity and the Law of Trust* 2d ed. (1970), 94.
[29] (1971), 16 D.L.R. (3d) 369.
[30] *Ibid.*, 374.

However, a majority of the House of Lords has held that a court cannot impute an agreement to the spouses which they did not make[31] and the doctrine of imputed intention was not discussed in *Murdoch.*

The submission on behalf of Mrs Murdoch that she made an indirect contribution to the purchase of the property through her labour raised even more difficult problems. Her counsel relied on the judgment of the Alberta Supreme Court in *Trueman* v. *Trueman.*[32] In that case the wife claimed an interest in her husband's property by doing more work on it than is usually expected of a farm wife. She worked in the fields beside her husband, operated the farm machinery and contributed to the fund which was realized from the sale of grain and livestock which was used to pay for the purchase of the farm. The evidence, which in this respect was similar to *Murdoch,* included "cutting the crop, stooking, cutting hay, raking hay, discing, harrowing, anything there was to do".[33] Mrs Trueman also shared the actual work of building the farm house.

Johnson,J.A. held that on these facts the wife was entitled to a one-half share in the property. He quoted extensively from the judgment of Lord Reid in *Gissing* in which his Lordship said that he could "see no good reason" for the distinction between direct and indirect contribution,[34] and from Judson,J.'s opinion in *Thompson.* The following passage from that judgment is crucial:

> But no case has yet held that, in the absence of some financial contribution, the wife is entitled to a proprietary interest from the mere fact of marriage and cohabitation and the fact the property in question is the matrimonial home. Yet, if the principle is sound when it is based on a financial contribution, no matter how modest, there seems to be no logical objection to its application and the exercise of the same discretion when there is no financial contribution when the other attributes of the matrimonial partnership are present. However, if one accepts the finding of the learned trial judge, the basis for the application of the rule at its present stage of development in England is not to be found in the present case.[35]

Johnson,J.A. noted that on the facts of *Thompson* there was no indirect contribution and therefore the principle subsequently accepted by Lord Reid was not applicable.[36] He then concluded that:

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[31] *Cf. supra,* f.n.14. See also Lesser, *supra,* f.n.4, 191-2.
[32] [1971] 2 W.W.R. 688; 18 D.L.R. (3d) 109 (Alta. S.C. App.Div.).
[33] [1971] 2 W.W.R. 688, 694.
[34] [1971] A.C. 886, 896.
[35] [1961] S.C.R. 3, 13-14.
[36] [1971] 2 W.W.R. 688, 693.

> In most of the English cases, the contribution is made by cash contributed by the spouse. It is evident from the passage from the judgment of Judson,J. in the *Thompson* case which I have quoted that this principle should logically extend beyond financial contributions. Surely if services which the appellant rendered relieved the respondent from employing extra help to do the work which the appellant did, the value of such work should be counted as a contribution both to the purchase price of the farm and to the improvement created by the building of the house.[37]

In the *Murdoch* case Martland,J. took an equivocal stand with respect to the status of *Trueman*. "Assuming that the conclusion ... was, on its facts, correct",[38] he attempted to distinguish the case in two ways. Firstly, he observed that *Trueman* involved an interest in the family homestead or matrimonial home whereas Mrs Murdoch claimed a share in her husband's ranching business.[39] It is submitted that this is not a ground for distinguishing the case. As mentioned above, the House of Lords and the Supreme Court have expressly stated that a court has no discretion to apply special rules to "family assets". This proposition was reiterated by both Martland,J. and Laskin,J. in *Murdoch*.[40] The same principles therefore apply to the matrimonial home as to other property. Secondly, Martland,J. observed that while in *Trueman* the trial judge found that the wife made a substantial contribution to the acquisition of the property, the trial judge in *Murdoch* decided that the wife had merely done the same work as any other ranch wife.[41] Martland,J. did not interfere with that finding and therefore equated Mrs Murdoch's labour with ordinary household chores which undoubtedly do not give a wife a proprietary interest in the home under a system of separation of property. However, in view of the fact that Mr Murdoch was absent from the property for five months of every year during which time his wife performed all the farming jobs that her husband would have done, the trial judge's finding might well have been overturned. After all, aside from Mrs Murdoch's work with her husband, does a normal farm wife spend five months of every year for twenty years tending her husband's property while he is away on other business? The failure of the courts to give her an enforceable remedy in return for these services was a travesty of justice.

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[37] [1971] 2 W.W.R. 688, 695.

[38] (1974), 41 D.L.R. (3d) 367, 375.

[39] *Ibid.* It is interesting to note that in *Thompson* v. *Thompson*, [1961] S.C.R. 3, 9 his Lordship distinguished *Rimmer* v. *Rimmer*, [1953] 1 Q.B. 63 on the same ground.

[40] (1974), 41 D.L.R. (3d) 367, 373, 384.

[41] (1974), 41 D.L.R. (3d) 367, 375-376.

The view of the facts which Martland,J. accepted avoided the necessity of considering whether indirect contributions can give an interest in property and whether *Trueman* should be overruled. Unfortunately his Lordship did not take the opportunity to consider those questions. It may well be that he considered that the above-quoted passage from Judson,J.'s judgment in *Thompson* indicated that a resulting trust will be inferred only from a direct financial contribution, for after his discussion of *Thompson* he stated that "[i]f a financial contribution is necessary in order to found the appellant's claim, it has not been established".[42] It is submitted that in certain circumstances indirect contributions should allow the courts to find a resulting trust in favour of the contributor and that *Trueman* was correctly decided. The House of Lords in *Pettitt* and *Gissing* discussed the problem of indirect contributions but it is wrong to conclude that a majority in *Gissing* believed that beneficial interests in property cannot be acquired solely by indirect contributions.[43] Lords Reid and Pearson appeared to state that an interest can be acquired through indirect contributions alone,[44] Lord Morris and Viscount Dilhorne were of the opinion that the intention of the spouses in each case will be a question of fact,[45] and Lord Diplock's judgment contains statements which seem to support both sides of the argument.[46] Finally, the *Thompson* case did not deal with the problem. Since there are thus no constraints of binding precedent it is submitted that the correct position with respect to indirect contributions is that they should enable a court to infer an intention of co-ownership provided they are not too remote from the acquisition of the property itself. Thus a purchase of clothing or furniture will not be sufficient while regular payments of a substantial sum for

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[42] (1974), 41 D.L.R. (3d) 367, 373. However, Laskin,J. apparently did not believe that Judson,J. considered the possibility that indirect contributions or physical labour may carry an inference of beneficial ownership. He stated at pages 384-5 that:

> I read this passage [of Judson,J.] as emphasizing the illogic of an arbitrary half-interest division in favour of a wife who has made little or no financial contribution. It does not relate to the equity considerations that may warrant a court in declaring some entitlement in a wife who has contributed substantially in money or in labour to the acquisition of property taken in the husband's name.

[43] But *cf. contra,* Lesser, *supra,* f.n.4, 194.

[44] [1971] A.C. 886, 896 and 903 respectively.

[45] [1971] A.C. 886, 898 and 900 respectively.

[46] [1971] A.C. 886, 907-908 and 909. But see Lesser, *supra,* f.n.4, 193.

property taxes on the house in dispute might be enough.[47] Furthermore, contributions of labour should not be characterized as indirect payments but as contributions of money's worth to the acquisition of property. It would be illogical to admit that a spouse can buy an interest in property which was built by another and yet deny that she can build that interest with her own hands. However, these submissions cannot be stated as categorical propositions of law and their acceptance in Canada must be subject to some doubt after *Murdoch*. Certainly Martland,J. expressed no opinion on these points, but his silence suggests that he may have been reluctant to venture beyond the inference of a resulting trust from direct financial payments. On the other hand, it will be seen that Laskin,J.'s dissent has the paradoxical effect of supporting the contention that indirect payments or contributions of physical labour do not justify the finding of a benefical interest through the medium of the resulting trust.

Laskin,J.'s judgment differed from that of the majority on both facts and law. His Lordship was of the opinion that Mrs Murdoch's "uncontradicted evidence of the physical labour" [48] could not be equated with simple housekeeping chores. He therefore overruled

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[47] This seems to be the view adopted by the English Court of Appeal after *Gissing* v. *Gissing*. See, *e.g.*, *Falconer* v. *Falconer*, [1970] 3 All E.R. 449. But it is possible that the post-*Gissing* decisions of the Court of Appeal ignore the distinction between direct and indirect contributions and between inference and imputation of intention. See Lesser, *supra*, f.n.4, 196-209. In *Murdoch* v. *Murdoch* (1974), 41 D.L.R. (3d) 367, 389 Laskin,J. cited those cases, noting that:

> What has emerged in the recent cases as the law is that if contributions are established, they supply the basis for a beneficial interest without the necessity of proving in addition an agreement (see *Hazell* v. *Hazell*, [1972] 1 All E.R. 923), and that the contributions may be indirect or take the form of physical labour (see *Re Cummins*, [1971] 3 All E.R. 782).

However, Martland,J. made no reference to any of the Court of Appeal's post-*Gissing* judgments and this may suggest that he did not think they were correctly decided.

[48] (1974), 41 D.L.R. (3d) 367, 378. His Lordship further observed that:

> On the evidence... I cannot share the trial Judge's appreciation of normalcy. The wife's contribution, in physical labour at least... can only be characterized as extraordinary.

This distinction was crucial but the Ontario Law Reform Commission has expressed the view (*supra*, f.n.6, 45-6) that:

> Fine legal distinctions concerning the normalcy of some duties, the "extraordinary" character of others and further judicial definition of the types of extraordinary duties that may move a court to find the creation of a beneficial interest will not serve to alter the uncertain state of the Law....

the trial judge's finding of fact. While his Lordship would also have been prepared to find that Mrs Murdoch made direct financial contributions, he based his judgment mainly on the effect of her physical labour for which he would have imposed a remedial constructive trust on the husband. Thus Mr Murdoch would have been under an obligation as a constructive trustee to convey to his wife the beneficial interest to which she was entitled.[49] This is an accepted restitutionary remedy in the United States[50] and his Lordship cited the following statement from the American treatise, Scott's *Law of Trusts*, to support his judgment:

> A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enrichcd if he were permitted to retain it... .[51]

It is true that in *Gissing* Lord Diplock remarked that the principle applicable to disputes about ownership is "the law relating to the creation and operation of 'resulting, implied or constructive trusts'"[52] and Laskin,J. might be thought to have simply built on this foundation. However, while some writers have called for a new approach, English law has not followed the American rule that the constructive trust is a remedy for unjust enrichment.[53]

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[49] Laskin,J. held that Mrs Murdoch's "various ventures in labour and money" entitled her to an interest in the Brockway property, but he refrained from "arbitrarily" fixing the size of her interest and would have referred it back for report on this point: (1974), 41 D.L.R. (3d) 367, 389.

[50] See, *e.g.*, American Law Institute, *Restatement of the Law of Restitution* (1937).

[51] Scott, V *Law of Trusts* 3d ed. (1967), 3,215. Laskin,J. noted that the Supreme Court of Canada in *Deglman* v. *Guarantee Trust Co.*, [1954] S.C.R. 725 seemed to adopt the American doctrine of restitution in an action for quantum meruit. However, in a review of the case law since *Deglman*, Professor Angus concluded that the decision did not "open the flood gates [of restitutionary remedies] in all directions... There have been applications of the general principle introduced by the Deglman case, but they could hardly be termed shocking in their scope": Angus, *Restitution in Canada Since the Deglman Case*, (1964) 42 Can. Bar Rev. 529, 559. See also McClean, *Unjust Enrichment — Common Law Wine in Civil Law Bottles*, (1969) 4 U.B.C. L.Rev. 1.

Angus's view must be read in light of recent cases which have given a somewhat broader application to the *Deglman* principle. See, *e.g.*, *Re Jacques* (1968), 66 D.L.R. (2d) 447; *Peter Kiewit* v. *Eakins Construction*, [1960] S.C.R. 361; *Farrar* v. *MacPhee* (1971), 19 D.L.R. (3d) 720; *Greenwood* v. *Bennett*, [1972] 3 All E.R. 586; *Parklane Hospital* v. *City of Vancouver*, [1973] 2 W.W.R. 289.

[52] [1971] A.C. 886, 905.

[53] See Waters, *The Constructive Trust* (1964), ch. 1, especially 9-26; Goff and Jones, *The Law of Restitution* (1966), 13; Granger, *Equity, Law, and Restitution*, (1967) 2 Ottawa L.Rev. 195; Samek, *Unjust Enrichment, Quasi-contract and Restitution*, (1969) 47 Can. Bar Rev. 1.

Instead the constructive trust has been viewed as a substantive institution applied to particular relationships including vendor and purchaser, mortgagor and mortgagee and fiduciary and beneficiary because in such cases the relationship has been characterized as analogous to the express trust.[54] Husband and wife have not previously been brought under this protective umbrella of the law.

Academics may argue that Canadian courts should adopt the full tenor of the American restitutionary remedies but the past record of the judiciary suggests that this will not happen.[55] Thus, until the position is changed by legislation, a spouse who may have worked like a trooper will have to establish a resulting trust in order to obtain a beneficial interest in the property. However, as mentioned above, there are statements in Laskin,J.'s judgment which suggest that a resulting trust will not be obtained from indirect contributions or physical labour. His Lordship, after stating that the resulting trust is a presumption which arises from the contribution of money to buy property, remarked that:

> ... the presumption (as a mere inference from the fact of payment of money) is considerably weakened if not entirely dissipated; and ... there is no historical anchorage for it where the contribution of money is indirect or the contribution consists of physical labour. ... and resort to the resulting trust to give it sanction seem[s] to me to be quite artificial.
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> The appropriate mechanism to give relief to a wife ... whose contribution to the acquisition of property is physical labour rather than purchase money is the constructive trust which does not depend on evidence of intention. Perhaps the resulting trust should be as readily available in the case of a contribution of physieal labour as in the case of a financial contribution, but the historical roots of the inference that is raised in the latter case do not exist in the former. It is unnecessary to bend or adapt them to the desired end because the constructive trust more easily serves the purpose.[56]

It follows that there was no "historical anchorage" for the inference of a resulting trust in *Trueman* or in any case involving indirect contributions. While the writer would not agree, a court might thus hold that *Trueman* was incorrectly decided.

The general reluctance of the courts to "bend or adapt" existing principles of resulting trust to obtain desirable social ends or to adopt the remedial constructive trust requires the provincial legis-

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[54] Waters, *The Constructive Trust* (1964), 2-3.

[55] See *supra*, f.n.51.

[56] (1974), 41 D.L.R. (3d) 367, 387-388. It should be noted that since the constructive trust arises in spite of the intention of the parties, this approach avoids the artificiality of ascribing an intention to them.

latures to act promptly in this matter. It is disappointing that the courts have not led the way but the notoriety of *Murdoch* must not be repeated. The *Divorce Act* gives the court in proceedings under that Act a discretion based on the conduct of the parties and their conditions, means and other circumstances to adjust effectively the property interests of husband and wife through orders for secured maintenance and lump sum payments.[57] The provinces must now ensure that a just and equitable division of property is effected in non-divorce proceedings.

The recent proposals of the Ontario Law Reform Commission are thus encouraging.[58] The present system of family property relations in Ontario and the common law provinces is separation of property. Under this system, as the *Murdoch* case graphically illustrates, each spouse owns only that property in which he or she can establish a proprietary interest through the rigid rules of property and trust law. The Commission's principal recommendation is that the system of separation should be replaced by a new matrimonial regime under which the spouses would be separate as to property during marriage but upon its termination would share equally in property acquired in the course of the marriage.[59] If that regime had applied to *Murdoch*, then upon termination of the marriage Mrs Murdoch would have been entitled to a one-half share in her husband's ranch assets. The new system recommended by the Commission would be the "basic regime"

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[57] *Divorce Act*, R.S.C. 1970, c.D-8, s.11(1). See, *e.g.*, *Ceicko* v. *Ceicko* (1969), 5 D.L.R. (3d) 360 (Man. Q.B.). It is doubtful whether the terms of the Act permit the court to order the conveyance of property from one spouse to another as a condition of the granting of a decree. See *Gomes* v. *Gomes* (1972), 24 D.L.R. (3d) 112 (B.C. S.C.) on s.12(b) of the *Divorce Act*. In the event that Mr and Mrs Murdoch should now petition for divorce, the court would be able to reconsider the question of maintenance in the light of the above-mentioned provisions It should not be estopped by the previous ruling in the decree of judicial separation that Mrs Murdoch be awarded $200 a month for maintenance. See MacDougall, "Alimony and Maintenance" in Mendes da Costa (ed.), I *Studies in Canadian Family Law* (1972), 282, 331-333.

[58] *Report on Family Law, supra*, f.n.6.

[59] *Ibid.*, 55-59. This proposal would have the following effect (*Ibid.*, 55):

> Subject to the Commission's subsequent recommendations respecting restrictions on dealings with the matrimonial home, and on the making of gifts that are other than reasonable or customary, the property position of the spouses during marriage will be the same as under the present law of Ontario — each will be free to hold and dispose of his or her own property.

The division of the family's assets (or "equalizing claim") would not take place until termination of the marriage.

for all future marriages unless the spouses "formally elect to have their property relations either governed by the regime of separate property or by a marriage contract".[60] It is beyond the scope of this paper to comment on the proposal, which involves an examination of the extensive rules prescribing family property relations, but it should be noted that a similar regime exists in the Province of Quebec.[61]

In addition to the basic reform of the family property system, the Commission proposes legislation dealing with the matrimonial home and its contents.[62] Particular attention is given to this subject because the Commission observes that:

> [t]he matrimonial home occupies a special position in family property relations for two reasons. First, it is the shelter and focal point of the family and second, it is an asset — usually the single item of property of greatest value owned by either or both spouses during marriage.[63]

Nevertheless, as the Commission notes, the present law is outmoded because of the necessity of a financial contribution by a claimant spouse, and also because it ignores completely the role of a wife who devotes her efforts to caring for the home and family.[64] The Commission therefore recommends reforms which it believes should be enacted independently of any changes in the matrimonial property regime.[65]

The Commission's proposed solution is that husband and wife be entitled to equal shares in the matrimonial home through the

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[60] *Ibid.*, 52-53.

[61] A recent study in this province has found that the proportion of marriages in which the parties have elected to exercise their right to opt out of the statutory regime is 53.3%. See Rivest, *Enquête auprès du Registre Central des Régimes Matrimoniaux* (1974), an unpublished private study conducted for the Civil Code Revision Office of Quebec. The study covered the period from 1 July 1970 (when the regime began) to the end of 1973. While it appears to indicate a high degree of dissatisfaction with the regime, the writer has been advised by the Civil Code Revision Office that it expects the number of marriages contracting out of the regime to decline gradually as knowledge of its provisions become better known.

[62] *Report on Family Law, supra,* f.n.6, 131-161.

[63] *Ibid.*, 131.

[64] *Ibid.*, 134. These remarks were made in the context of the matrimonial home but the *Murdoch* case illustrates that the comments are equally applicable to other assets. Mrs Murdoch claimed an interest in her husband's ranching business. The farmhouse which they used as their matrimonial home formed only a part of the ranch assets.

[65] *Ibid.*, 131.

adoption of "the principle of co-ownership".[66] The proposal would ensure that the spouses will not be deprived of joint control of the home even if title is not held in both names, since in every disposition of the property the non-titled spouse must either be a party to the transaction or sign a written form of consent to it.[67] The full rights of parties who hold security interests in the home at the time the law comes into effect are preserved.[68] But in the future, if a mortgage is obtained without the consent of the non-titled spouse, the mortgagee will not be entitled to realize his security in respect of that spouse's share in the property.[69] Provision is made for the spouses to agree that the home should not be jointly owned but the Commission also recommends that the courts be given "broad powers... to set aside or vary such arrangements".[70] It must be emphasized that the Commission proposes that the legislation be given retrospective effect in order "to supplant an already arbitrary doctrine with one that coincides more closely with public expectations".[71]

Two principal criticisms can be made of this proposal. Firstly, it would complicate real estate transactions. Every purchaser and mortgagee of residential housing would be put on enquiry about the owner's marital status where title is not held in the joint names of husband and wife. Failure to obtain consent could have grave consequences for a purchaser or mortgagee.[72] Moreover,

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[66] *Ibid.*, 135. In the Commission's view this principle "would give full legal acceptance to the extremely prevalent and growing practice of husband and wife taking title to the matrimonial home in their joint names": *ibid.* The Commission's definition of the matrimonial home is "the dwelling, and the area attached thereto, that is owned by either of the spouses, and occupied by them during marriage as their principal family residence": *ibid.*, 132. The Commission accepts the definition of "curtilage" in *Black's Law Dictionary* 4th ed. (1951), 460 to describe the area attached to the matrimonial home ("a space, necessary and convenient and habitually used for the family purposes, and the carrying on of domestic employments"): *ibid*, 132-133.

[67] *Ibid.*, 137. The Commission recommends that the non-titled spouse's interest be capable of registration but that it should, without registration, prevail over the claims of third parties who transact solely with the titled spouse: *ibid.*, 140.

[68] *Ibid.*, 139.

[69] *Ibid.*, 141.

[70] *Ibid.*, 136.

[71] *Ibid.*, 138.

[72] The Commission recommends at page 141 that:

> If a matrimonal home is sold by one spouse without the written consent of the other spouse, or without a court order dispensing with consent... the non-consenting spouse should have a claim against the other spouse

given the mobility of Canadians, it may sometimes be difficult to determine whether an owner is married. Secondly, while it is evident from the *Murdoch* case that a spouse should not have to make a financial contribution to obtain a proprietary interest, it must be asked whether a spouse who has made no such contribution to the marriage should necessarily be entitled to a one-half share in the home. Should an incorrigibly lazy husband who did not support his family and merely "hung up his hat in the hall"[73] be given the right to an interest in a matrimonial home purchased by his wife? It is therefore submitted that a more flexible remedy be developed along the lines of the discretionary powers granted to the courts in England and New Zealand in all questions of family property.[74] The only disadvantage of that approach is that, while the Commission's recommendations would give the spouses guaranteed rights, the English and New Zealand statutes require the spouses to apply for an exercise of the court's discretion.

Finally, it should be noted that if the Commission's recommendations on the matrimonial home are adopted independently of the proposed reform of the matrimonial regime, there may still be instances of injustice unless other reforms are enacted. No case illustrates this point more clearly than *Murdoch*. If the precise terms of the Commission's proposals on the matrimonial home had been applied to the facts of that case, Mrs Murdoch would have been entitled to a one-half share of the ranch house but she would have had no claim to the rest of her husband's

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for one-half the proceeds of the sale or the right to apply to the court to have the sale set aside and for such other relief as the court may deem just.

The mortgagee's security interest would be reduced by a failure to obtain consent. See *supra*, f.n.69.

[73] See *Collins* v. *Collins*, [1964] A.C. 644, 657.

[74] In England, the *Matrimonial Proceedings and Property Act*, 18-19 Eliz. II, c.45, s.4 provides that on the grant of a decree of divorce, nullity or judicial separation the court may order either spouse to transfer property to the other. Section 5(1) provides that in exercising this power the court must have regard to all the circumstances of the case, including such matters as the income and financial needs of the spouses and the contributions made to the family's welfare (which includes looking after the home and caring for the family). In New Zealand, the *Matrimonial Property Act*, 1963, N.Z., no.72, s.5 provides that in any dispute between the spouses on the title to property, they may apply to a judge or magistrate who "may make such order... whether affecting the title to property or otherwise, as appears just ... notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property". See s.5(3).

property. The house would have been the matrimonial home because it was the "principal family residence",[75] but the land would not have been considered accessory to the home in terms of the Commission's definition because it was not "used for the family purposes, and the carrying on of domestic employments".[76] Furthermore, she would have had no right to the cattle or other ranch assets.[77] Thus, once again, Mrs Murdoch would have been denied the fruits of her labour.

Peter Jacobson *

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[75] See *supra*, f.n.66.

[76] *Ibid.*

[77] The Commission recommends that a right to occupy the matrimonial home, which is an incident of the principle of co-ownership, should include the right to "use and enjoy" the "household goods". However, goods used for business purposes are excluded from the definition of "household goods". See *Report on Family Law, supra*, f.n.6, 145-147.

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