F. W. GUEST MEMORIAL LECTURE: WITH MY WORDLY GOODS I THEE ENDOW— THE DIVISION OF FAMILY ASSETS AT LAW

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The F. W. Guest Memorial Trust was established to honour the memory of Francis William Guest, M.A., LL.M., who was the first Professor of Law and the first full-time Dean of the Faculty of Law at the University of Otago, serving from 1959 until his death in November 1967.

It was felt that the most fitting memorial to Professor Guest was a public address upon some aspect of law or some related topic which would be of interest to the practitioners and the students of law alike.

First, could I express my appreciation to those responsible for inviting me to deliver this, the seventh F. W. Guest Memorial Lecture. When I view the six names that precede mine on the list and think of the even more distinguished people who will without doubt deliver this lecture in the future, I have the uncomfortable feeling that 1974 may be regarded by some as a lean year. But I take comfort in the thought that I can claim one distinction; none of the speakers will have known Frank Guest quite as well as I knew him. He was my close colleague in the formative years of this Faculty and I shall always remember him with respect and affection.

Professor Guest is best remembered for his work in Torts, in later years in Jurisprudence, and to a lesser extent in the law of Evidence. It is sometimes forgotten that he was my predecessor as a teacher of Family Law at this University; and so I think it is fitting that at least one of these memorial lectures should be devoted to some aspect of that subject and the topic I have chosen is one that is much in people's thoughts at the moment here and elsewhere—Matrimonial Property.

The problem of who owns the family assets, who controls them during the marriage, and what happens to them when the marriage is terminated is almost as old as the institution of marriage itself; and the solutions presented are almost as numerous as the jurisdictions in which they have their source. But these solutions can almost without exception be placed in one or other of two systems. The first, which obtains in most European countries and in some of the North American states, is known as the system of Community of Goods or simply "The Community System". Its main tenets are that certain of the family assets are held jointly; during the marriage they are controlled by one of the parties (usually the husband), and on the termination of the marriage they are shared equally by husband and wife.

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It is a system that has some disadvantages. There are some minor technical difficulties when it comes to distinguishing family assets from personal assets, and in respect of business relationships the couple may have with third parties. The question of control can raise more serious problems: the husband may or may not be the person best qualified to deal with the family property during the currency of the marriage. However the system has some virtues. It makes for certainty, it has some relevance to the marriage vows which the couple swear at the altar, and it brings in the main a greater degree of justice.

The alternative scheme, found in most Common Law jurisdictions is that of "Separate Property". Under this system each party continues to own what he brings to the marriage; he owns and controls what he acquires during the marriage; and on its termination he retains his ownership in whatever is his. It is a simple system, and like most simple answers to complex problems, it is unsatisfactory, and has been responsible for much injustice.

I have said it is found in most Common Law jurisdictions. This is not to say it is the product of the Common Law. It is in fact statutory, being based on statutes of 1882 in England and 1884 in this country; and these acts in their day were as revolutionary as any passed by the respective legislatures. I stress this fact because so often when one puts forward ideas that are unfamiliar, one is met with the objection that "this is not in accordance with the orderly development of the Common Law". Well, the present system is not the outcome of orderly development either. It was created by a statute and if one act can create it another can just as easily introduce something more consistent with the social climate of the times. I would point out further that the Married Women's Property Act 1882 was passed by upper-middle class people for the benefit of upper-middle class people and as such it served its purpose. The Forsytes of the last quarter of the Nineteenth Century had a "matter of fact" attitude to marriage and they could afford legal advice. This act enabled them to protect the property of their womenfolk.

The Twentieth Century brought a different problem for which the act of 1882 had no satisfactory answer. The so-called working classes were now accumulating property by their joint efforts without any real knowledge of the legal position until the marriage broke up; they then found themselves in a situation they had not forseen and could not have been expected to foresee. All their married lives they had regarded certain property as "ours". Now it appeared there was no such thing as "our property". It was either "his" or "hers". Mostly "his" because the criterion by which the law determined ownership was payment. In the final analysis the crucial question was "from whose purse did the money come for the purchase of the asset?" In most cases, of course, payment was (and still is) a matter of chance. By tradition the husband alone earned income and by tradition he attended to the technicalities associated with the acquisition of property.

Students of Family Law are familiar with the attempts of the courts to minimise the injustices of this inequitable system, and in particular with the efforts of certain liberal minded judges (notably Lord Denning) to make use of section 17 of the act of 1882 which provided that in a dispute between husband and wife over family property the judge might make such order as he thought fit. The judges interpreted this in the most generous sense to give themselves power to

do justice in a broad sense between husband and wife whatever the strict legal position. This well intentioned attempt received its quietus in 1969 in England when the House of Lords in *Pettitt* v. *Pettitt*[1] held (probably correctly) that the section was not intended to be interpreted in this way.

Pettitt v. *Pettitt* came in for a deal of criticism. It was described as a reactionary judgment. But was it? Could it not be seen as a justifiable protest by the Lords against a method of deciding ownership which in fact has some serious shortcomings. One of the main characteristics of the law of property is its insistence on certainty; and what certainty is there when title depends entirely on the discretion of a judge with no guidance from the statute and little from any other source? And uncertainty in law increases the likelihood of litigation. It is not without significance that in certain parts of New Zealand there is a lengthy backlog of cases involving matrimonial property disputes. Much of this uncertainty could of course be removed by limiting the court's discretion or by laying down guidelines.

This, in fact, is what the New Zealand legislature did in 1963 when the Attorney-General J. R. Hanan, a distinguished son of this Faculty, persuaded it to pass two acts, the Matrimonial Property Act and the Matrimonial Proceedings Act, in what he described as a "New Deal for married women". That it never, in the event, proved a new deal was due first to some indifferent drafting. The Matrimonial Property Act provided that in settling disputes between husband and wife as to the ownership of property, the court might make such order as it thought fit, and then went on to enumerate the matters which the judge should take into consideration in exercising his discretion, including the respective contributions of husband and wife. It added an unfortunate parenthesis: "whether in the form of money payments, services, or prudent management". This wording has encouraged some judges to place undue emphasis on the word "contributions", and give to the word a meaning I am sure neither Parliament nor Mr Hanan ever intended.

Nevertheless the legislation got off to a good start. In the first few months of its operation a decision of prime importance was handed down by Woodhouse J. in *Hofman* v. *Hofman*.[2] It was a thoughtful, forward-looking judgment and seemed to suggest that a wife would be given credit for any contribution she might make to the marriage, and that she might make a claim against the family assets as a whole. This liberal interpretation was in the main followed by his brother judges, and as specific points were ironed out there was a feeling among the members of the profession that the law was settling down satisfactorily.

The Court of Appeal was not so enthusiastic. In *Hofman* v. *Hofman*[3] the Court of Appeal had deliberately refrained from expressing agreement with all that Woodhouse J. had said in the Court below. Again in *Pay* v. *Pay*[4] it had made some conservative comment; and finally in 1971 a case reached the Court under the name of *E* v. *E*.[5] The case had some unusual features. The parties had

1 [1970] A.C. 777.
2 [1965] N.Z.L.R. 795.
3 [1967] N.Z.L.R. 9.
4 [1968] N.Z.L.R. 140.
5 [1971] N.Z.L.R. 859.

accumulated a substantial amount of property, it was not confined to the matrimonial home, and the wife's case did not appear to have a great deal of merit. The main issue was whether she could on divorce claim a share in the family assets as a whole, and the majority said she must show a contribution of some sort to each asset she was claiming. As the Chief Justice pointed out in his minority judgment, this was unrealistic. If this is the law, a married woman would be well advised to buy a notebook, make a note of every cent she spends, and ensure that anything she contributes is spent on something she can later identify. One has only to state the law in this bald fashion to realise how out of touch it is with reality and with our concept of marriage as an equal partnership.

One could devote an inordinate amount of time to analysing and criticising *E* v. *E* and suggesting ways of circumventing it. I prefer to regard it as a reasonably clear case of misrepresentation of a statute, and rather consider the legislative action that might follow. I take comfort in the thought that in *E* v. *E* the wife suffered no great injustice. I do not have the same comfortable feeling about the case that followed it—*Haycock* v. *Haycock*.[6] There the parties were married for 27 years. In the early years the wife shared the hard life of a small farmer, she bore her hubsand five children, the last some years after the others. She had a breakdown in health. When she claimed a just share of the assets she had helped to accumulate the court held that she could not get credit for the contributions she might have made if she had been in better health.

This to me is the chief weakness of the present system: this over-emphasis on "contributions", and the restrictive interpretation of the word. Judges tend to assess a wife's contributions not as a wife but as a housekeeper. We find them saying something like this: "The wife has made a valuable contribution; she has been a *careful* housewife but of course her contributions were not as great as her husband's." Now I suggest that this line of thought runs counter to our concept of marriage as an equal partnership. If we are to take into consideration her contributions they should be her contributions as a wife and a mother, not the few dollars she has saved by careful budgeting or interior decorating—"prudent management" as the Act calls it.

But even if we give the word "contributions" a liberal interpretation, I still regard its inclusion in the Act as unfortunate. How does a judge evaluate the respective contributions of husband and wife when they operate in such widely differing fields? The evidence he has to work with is notoriously unreliable and frequently biased. And he can get bogged down so easily in a mass of trivia. In a recent article[7] Mr S. C. Ennor suggested that the wife of a business executive who entertained her husband's business associates was making a greater contribution to the family assets than the wife of a wage earner who presumably ironed his shirts and put the children to bed. Instead of embarking on an analysis of that proposition a judge might be safer applying the old equitable maxim "equality is equity".

Finally, if we must retain our present system of resting owner-

6 [1974] 1 N.Z.L.R. 146.

7 Ennor, "The Matrimonial Property Act 1963—A New Deal?" [1972] N.Z.L.J. 500, 506.

ship of family property on a court's discretion, we should at least ensure that the parties start off on an equal footing. In other words we should presume, as they do in Victoria in respect of the family house, that until the contrary is shown the family assets belong to husband and wife in equal shares.[8] At present the presumption (not a legal one of course) is usually that the assets belong to the husband because he paid for them. This puts the onus on the wife to establish her claim and explains why she is rarely granted even a half share.

None of these ideas seems to have commended themselves to a committee set up by the Justice Department in 1971 following *E* v. *E* to advise the Government on possible reform of this branch of the law.[9] In the main, the amendments suggested are of a minor nature, the only one worth noting being a recommendation that a wife should be allowed to claim on the family assets as a whole without having to prove contributions to any specific asset. In short *E* v. *E* would, if the recommendation were accepted, trouble us less.

Now it may be that these recommendations are intended as a stop gap—something to remove the difficulties created by *E* v. *E*, and that the Justice Department Committee hopes to recommend changes of a more fundamental nature after more mature consideration. But frankly I doubt if this is its intention.

One should not be too ready to attribute to a committee the view of one of its members; but I think it is a fair inference from the text to the recommendations and from the published comments of Mr Ennor[10] that on the main issues Mr Ennor's views are representative of those of the majority of the committee members. And if they are, I can only say that those of us who knew the committee was working on this matter and expected so much from it cannot but be disappointed. Conservatism one expects from lawyers. We are all pragmatists by training. But today in the field of legal reform the comparative approach is standard practice. And in these writings I find little evidence of it. Yet there is so much activity in this field in almost every jurisdiction in the western world and so much literature available. If the legislature accepts these recommendations as a permanent solution then Mr Hanan's "New Deal" for married women is still, I fear, a long way off.

When I turn to the report of the English Law Commission studying the same problem on the other side of the world I get a different picture. This body includes some of the most notable lawyers in the Commonwealth under the chairmanship of a judge of high reputation. It has of course the advantage of being a permanent commission, and its first report dated May 1973 indicates that its members have had a long, hard look at most of the systems of Western Europe, North America, and the Commonwealth (including our own). They do not recommend the introduction of a community system. Their first recommendation is that during the marriage the parties shall own and

8 Marriage Act 1958 (Vic.), s. 161 (4) (b).

9 The principal recommendations of the Committee are listed by Ennor, supra n. 7, 503.

10 See Ennor, supra n. 7, 503-506 and the views of the same writer expressed in a paper, originally delivered at a Family Law Seminar organised by the Legal Research Foundation in Auckland in October 1973, and reproduced in "The 'Reasonable' Approach to Matrimonial Property Division" [1974] Recent Law 75, 111.

control what they bring to it and what they acquire during it. On termination of the marriage, what might be termed the "family assets" are shared equally. The family assets do not include what the parties own at the outset, or what they acquire during the marriage by gift or inheritance, or for that matter what they agree to exclude. And there is always the safeguard that if a couple do not like this arrangement they can contract out of it. Nothing could be more fair.

This is the best solution I have so far encountered. It has been dubbed a system of "Deferred Community"—an unfortunate term because the mere mention of the word "community" is sufficient to condemn it in the eyes of those who have a phobia about things foreign. It is not a community system. It is in fact a system that combines the best features of both systems I have mentioned. The interesting thing about recent developments in Scandanavian and some other Western European countries is that they appear to be working from the other end of the tunnel. You will remember that earlier I mentioned certain disadvantages of the community system and in particular the question of control during marriage. The system worked well enough in a society where the husband was in fact the dominant partner, but in modern times the community system is no more appropriate in Europe than the system of separate property is here. So we find them borrowing from us the idea that the parties continue to own and control certain of the family assets during marriage. The community concept comes into play only when the marriage breaks down.

In short, the Civil Law and the Common Law systems both seem to be working towards a common solution, and I am confident that in a few years the system of deferred commnuity will be universal. There is no indication of its immediate introduction into this country. If the English legislature accepts the recommendations of its Law Commission (as it normally does), the attitude of our authorities may change.

One naturally asks whether there is a place in such system for judicial discretion, especially when the parties have been granted freedom to exclude assets or contract out altogether. I think there is. As so often in matrimonial disputes it is the children that are the complicating factor. A rigid division of property, especially the matrimonial home, may adversely affect their welfare. It is not always easy to separate the issues of property and maintenance. I favour the inclusion of a residual discretion provided the legislature makes it clear that it is to be exercised according to the criterion of future responsibilities and not that of past faults.

Many of our judges still find it difficult to put behind them the concept of "fault" which became an integral part of their thinking through training and professional experience, and I am satisfied that despite the 1968 amendment to the Matrimonial Property Act and the ruling thereon of the Court of Appeal in *E* v. *E*, fault continues to play a more significant role in many decisions on the ownership of matrimonial property than the legislature intended it should.

Over eighty years ago a scholarly Dunedin lawyer named McGregor, generally regarded as the pioneer of New Zealand's unique contribution to family law, pointed out to his fellow parliamentarians

the weaknesses of the fault concept.[11] Marriage, he said, was such a complex relationship, that no matter how reliable the evidence (and it is notoriously unreliable) the judge saw only the tip of the iceberg. His views were confirmed in the nineteen twenties by New Zealand's most famous jurist, Sir John Salmond.[12] Yet, we had to wait another forty-odd years for the general acceptance of the breakdown principle. In the field of matrimonial property it has not yet been fully accepted, and I should be sad to think that we would have to wait another forty-odd years for that.

I have hinted in the last paragraph that New Zealand was a pioneer in the field of family law. Today we are in danger of tailing the field. A perusal of the latest English cases[13] confirms the suspicion that at the moment the English married woman on the termination of her marriage is receiving a better deal than her New Zealand sister. We have reached this position, I submit, because we have fallen into the error that Otto Kahn-Freund warned us of in another memorial lecture.[14] He said: "Lawyers are in danger of getting lost in the technicalities and overlook the prime importance of the sometimes evolutionary and sometimes revolutionary social transformations which make nonsense of the legal techniques developed by earlier generations". In a survey of recent cases[15] (most of them as yet unreported) two writers listed no fewer than five which centred around one issue—when the couple capitalised the family benefit to enable them to buy a home did the husband make the wife an additional allowance. Too much valuable judicial time is being wasted on trivia of this nature, and the attention of the court is being diverted from the real issue viz. "Did these people in the course of their life together accumulate assets by their joint endeavour? If so, is there any valid reason why they should not divide those assets equally?"

Sooner or later we must all accept or reject the proposition that marriage is a partnership. We cannot be ambivalent, and say, as Sir Alfred North said in *E* v. *E*[16] ". . . the modern view that marriage is a 'partnership' can be pushed too far . . ." If we are not prepared to share our worldly goods we should not say so at the altar.

It is no answer to say that the couple can make provision for the problem we have been discussing either at the beginning of the marriage or during its currency. At the time of the ceremony nothing is further from their thoughts than a possible breakdown of the relationship, and such provision during the marriage is contrary to the spirit of marriage.

One final thought. It is usually at the husband's request or even insistence that the wife remains in the home and creates for him and his children some sort of a refuge from the pressures of the outside world. As Sir Jocelyn Simon said:[17] "The cock can feather the nest

11 (1920) 187 N.Z.P.D. 1160-1164.
12 *Lodder* v. *Lodder* [1921] N.Z.L.R. 876.
13 See e.g. *Wachtel* v. *Wachtel* [1973] 1 All E R. 113.
14 Kahn-Freund, *Matrimonial Property: Where Do We Go From Here?* Josef Unger Memorial Lecture (1971, University of Birmingham Press) 9.
15 Vaver and Claydon, "Family Benefit Capitalisation and the Valuation of Interests in Matrimonial Property Disputes" (1974) 6 N.Z.U.L.R. 171.
16 Supra, n. 5, 883.
17 *Pettit* v. *Pettit* [1970] A.C. 777, 811 per Lord Hodson quoting from an extra-judicial address of Sir Jocelyn Simon.

because he does not have to spend most of his time sitting on it".

So far the approach to the problems of the ownership of matrimonial property has been pragmatic, and one might hope that the orderly development of this branch of the law could be left to the judges for a time. Decisions such as *E v. E* and *Haycock* v. *Haycock* make it clear that this is no longer possible. The responsibility is back with the legislature, and there is no point in that body introducing patchwork remedies such as the committee of 1971 suggested. There must surely be a complete re-thinking consistent with the changed attitudes of the community towards this increasingly important question. The name we give to any new system of family ownership is of no importance. If it bears some resemblance to a continental system of longstanding, it is none the worse for that, especially if that system has itself undergone changes to meet modern conditions. The English Law Commission was not too proud to study continental systems before it made its final recommendation. New Zealand could follow its example with advantage.