COMMENT

A SMORGASBORD OF PRINCIPLES—*DE FACTO* SPOUSES AND THE MATRIMONIAL HOME

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The observation has been made in Australia, England and the United States of America that where there is a property dispute between an unmarried couple, there is a growing number of legal concepts which potentially can be argued in relation to the same fact situation.[1] These include at least: express, implied and constructive trusts;[2] express and implied contract;[3] proprietary estoppel;[4] quasi-contract;[5] the tort of deceit;[6] implied partnership[7] and unjust enrichment.[8] No doubt there are others. No one concept provides a panacea, despite the exhortations of disciples of each discipline.[9] The moral is that multiple legal concepts should be presented to a judge in any particular case, as no single legal concept will be satisfactory for all fact situations involving property disputes between *de facto* spouses. In *Hardwick* v. *Johnson*[10] Roskill L.J.

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[1] *E.g.* Bailey, "Recent Cases: *Chandler* v. *Kerley*" (1979) 53 A.L.J. 92; *Hardwick* v. *Johnson* [1978] 2 All E.R. 935, 938h, 940e.

[2] *E.g. Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685.

[3] *E.g. Tanner* v. *Tanner* [1975] 1 W.L.R. 1346; *Pearce* v. *Pearce* [1977] 1 N.S.W.L.R. 170.

[4] *Pascoe* v. *Turner* [1979] 2 All E.R. 945; Davies, "Informal Arrangements Affecting Land" (1979) 8 Sydney Law Review 578.

[5] *Shaw* v. *Shaw* [1954] 2 Q.B. 429; *Stinchcombe* v. *Thomas* [1957] V.R. 509; *Deglman* v. *Guaranty Trust Co. of Canada* [1954] 3 D.L.R. 785.

[6] *E.g. Pearce* v. *Pearce* [1977] 1 N.S.W.L.R. 170; *Eves* v. *Eves* [1975] 3 All E.R. 768.

[7] *E.g.* Bruch, "Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services" (1976) 10 Family Law Quarterly 101; Steinem, "The Implied Partnership" (1974) 26 University of Florida Law Review 221; *Chaachou* v. *Chaachou* (1961) 136 So. (2d) 206.

[8] Goff and Jones, *The Law of Restitution* (2nd ed. 1978); Waters, "Matrimonial Property Disputes—Resulting and Constructive Trusts—Restitution" (1975) 53 Canadian Bar Review 366.

[9] *E.g.* Atiyah, "When is an Enforceable Agreement Not a Contract? Answer: When it is an Equity" (1976) 92 L.Q.R. 174 (in praise of contract); Oughten, "Proprietary Estoppel: A Principled Remedy" (1979) 129 New Law Journal 1193, Davies, "Informal Arrangements Affecting Land" (1979) 8 Sydney Law Review 578 (in praise of proprietary estoppel); Waddams, "Legislation and Contract Law" (1979) 17 University of Western Ontario Law Review 185; Waddams, "Unconscionability in Contracts" (1976) 39 Modern Law Review 369 (unconscionability).

[10] [1978] 2 All E.R. 935. *Cf. Crabb* v. *Arun District Council* [1976] Ch. 179, 193 *per* Scarman L.J.: "I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance"; *Marvin* v. *Marvin* (1976) 557 P. 2d 106, 123, n. 25 *per* Tobriner J.: "Our opinion does not preclude the evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; the suitability of such remedies may be

stated that ". . . the courts must, in my view, be careful when family arrangements are entered into not to try and force those family arrangements into an unfitting legal strait-jacket".[11] Therefore the judge should be presented with a smorgasbord of principles, from which to select the most appropriate remedy. No doubt as the law develops in this area, there will be uncertainty until it becomes more apparent which fact situations will prompt some particular remedy or remedies from the assortment available. However, it is submitted that there already is a substantial degree of predictability of legal result possible from the *facts* of each case, though along the way the facts may be awkwardly squeezed into existing legal concepts.[12] That is, it can be argued that recent decisions involving disputes between *de facto* spouses are both "fair" *and* predictable, despite the variety of concepts used. To illustrate this thesis, three English cases will be discussed.

In *Chandler* v. *Kerley*,[13] Mr Kerley left the jointly owned matrimonial home in 1974, and shortly afterwards his wife, Mrs Kerley (the defendant), became Mr Chandler's (the plaintiff's) mistress. In 1975, the Kerleys unsuccessfully tried to sell their house for £14,950, then £14,300. With the mortgagee threatening to foreclose, they agreed to sell it to the plaintiff for £10,000. In exchange, the plaintiff expressly agreed that the defendant and her two children by the marriage could continue to live there indefinitely, and the plaintiff would move in and eventually marry the defendant. The defendant was able to encourage her husband to co-operate by taking only £1,000 of the net proceeds of sale, while he took £1,800. In February 1976, six weeks after purchasing the house, the plaintiff broke off his relationship with the defendant. He then gave her notice to quit and brought an action for possession, while the plaintiff counter-claimed for a declaration that she was a tenant for life or a licensee for life, or alternatively, that she was a beneficiary under a trust whereby she had the right to remain there with her children for as long as she wished.

In May 1977, the trial judge dismissed the plaintiff's claim and declared the defendant to be beneficially entitled to occupy the house for life under a trust. The English Court of Appeal (Lord Scarman, Megaw and Roskill L.JJ.) unanimously allowed the plaintiff's appeal. They decided that the defendant had a vague contractual licence which was terminable on twelve months' notice. This time was necessary to give the defendant ample opportunity to rehouse herself and her children without undue disruption.

One commentator has suggested that, "[h]ad Mrs Kerley's claim come before Lord Denning, she may well have been given a right of occupation more generous than that terminable upon twelve months' notice accorded

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determined in later cases in light of the factual setting in which they arise"; followed by the Superior Court of California in *Marvin* v. *Marvin* (1979) 5 Fam.L.R. 3077, 3085.

[11] [1978] 2 All E.R. 935, 940.

[12] *E.g. Pearce* v. *Pearce* [1977] 1 N.S.W.L.R. 170; *Tanner* v. *Tanner* [1975] 1 W.L.R. 1346.

[13] [1978] 1 W.L.R. 693.

her by Lord Scarman"[14] and "[a]pplication of principles of equity to provide a right might have led to a more just result".[15] Perhaps these statements are correct. However, this writer suggests an alternative viewpoint, namely that switching categories will not provide *on these facts* either more certainty of result or "justice", as that concept is presently perceived by many of the judiciary. It is submitted that if one concentrates upon analysing the facts and results of cases like *Chandler* v. *Kerley*,[16] rather than the established doctrine debated in each, then a reasonably predictable pattern of what is judicially perceived to be "justice" emerges.

For example, in the light of certain values which arguably are hinted at in many judicial statements, what facts help the applicant, and what facts hinder her claim? Here is a list of facts which probably worked against Mrs Kerley being given any remedy:

(1) The parties had only known one another for two years.

(2) There had been no actual cohabitation, only a visiting relationship.

(3) Neither of the children in the home was a product of the relationship between the plaintiff and the defendant; nor apparently had the plaintiff acted *in loco parentis* to them.

(4) The plaintiff had apparently not been an obvious "cause" of the defendant's marriage breakdown; he arrived on the scene afterwards.

(5) Mrs Kerley, though far from wealthy, was apparently not financially destitute.

(6) Mrs Kerley potentially had another source of maintenance, namely her husband.

(7) Mrs Kerley's contributions and actions to her detriment effected in reliance upon the existence of some legal right to reside were arguably relatively small. She suffered two clear financial losses. First, relying upon the existence of some right to reside arising from the plaintiff's express promise, she sold her interest in a house (which she had to sell in any event because of the mortgagee's foreclosure) cheaply. Secondly, she in effect gave her husband £400 to encourage him in this enterprise. Conceivably, the house might have sold in time on the open market for £13,000, of which she would have received half of her equity, that is, approximately £3,000. Instead, relying on the plaintiff's promise, she received £1,000. Mrs Kerley in effect paid out approximately £2,000 in reliance upon, or in return for, the plaintiff's promise. On the facts and actual result, £2,000 was arguably a very "just" and "fair" exchange for her actual *four* years of rent-free accommodation in the house.

(8) The plaintiff was apparently not a man of substantial wealth. All his capital had already been invested in the house for three years, with no benefit to him during that time.

Conversely, what follows is a list of facts which arguably worked in favour of Mrs Kerley being given *some* remedy:

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[14] Bailey, *op. cit.* 94.
[15] *Ibid.*
[16] [1978] 1 W.L.R. 693.

(1) Mrs Kerley was not a "mere" mistress.[17] They had definite plans to cohabit as man and wife, and later to marry formally.

(2) The plaintiff clearly made an *express* promise that Mrs Kerley could live in the home indefinitely. It was not a promise merely implied from the circumstances. The only mitigating factor was that the plaintiff's promise was not presently false and deceitful.[18] That is, the plaintiff clearly broke an express promise, but not to further a pre-existing fraudulent intent.

(3) Mrs Kerley acted in reliance upon this promise by giving up in effect as much as £2,000.

(4) There was some implication that the plaintiff was at fault in the break-down of their relationship.

(5) A settled family with children should not suddenly be ejected from their home. A reasonable time should be given to allow orderly resettlement.

When these ethical evaluations on either side of the scale are weighed up, it is arguably quite a reasonable conclusion for Mrs Kerley to be given something for her £2,000 outlay, or for the plaintiff to suffer some consequences for the breach of his express and relied-upon promise. Moreover, a judgment which in effect makes the guilty plaintiff-promisor lose a £10,000 investment for four years, in return for the defendant-promisee's complete loss of £2,000, is not obviously inequitable. No doubt such a result does not amount to a decree of specific performance of the promisor's express promise. However it is clear that the judges are not trying to mete out remedies which fit neatly into the contractual mode of analysis.

Likewise, on a comparison of the two decisions of *Tanner* v. *Tanner*[19] and *Horrocks* v. *Forray*,[20] it has been suggested that "[the latter] case is not so easily distinguishable from *Tanner* v. *Tanner*"[21] and "[o]ne might suggest that had Lord Denning been sitting in court for the later decision, Maxine Forray would have got her remedy".[22] Perhaps these statements are correct, but again, given the clear difference in facts in each case, and the present weighing up of values by many judges, it is submitted that the cases are easily distinguishable *and* that the result in each is reasonably predictable. For example, in *Horrocks* v. *Forray*,[23] where the woman was awarded nothing:

(1) The relationship was kept secret and there was never any cohabitation.

(2) The man had lavishly supported the woman and the child of their relationship with accommodation and money for thirteen years. The

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[17] *Cf. Horrocks* v. *Forray* [1976] 1 W.L.R. 230.

[18] *Cf. Eves* v. *Eves* [1975] 3 All E.R. 768; *Pearce* v. *Pearce* [1977] 1 N.S.W.L.R. 170.

[19] [1975] 1 W.L.R. 1346.

[20] [1976] 1 W.L.R. 230.

[21] Bailey, "Legal Recognition of De Facto Relationships" (1978) 52 A.L.J. 174, 184.

[22] *Id.* 185.

[23] [1976] 1 W.L.R. 230.

relationship had produced only one child, who was aged 13 when financial support ceased.

(3) The woman during that time was also the mistress of another visiting gentleman by whose name she was sometimes known, and had been married to and divorced from another in the interim.

(4) If the claimant was successful, that result would eat up or diminish the only asset in the man's estate, thereby depriving the "innocent" *de jure* wife of her only asset.

(5) The woman was claiming a lifelong interest in the man's only asset, a farm purchased in 1973 for £36,500.

(6) The man had not been "at fault" in the termination of the relationship, as it was ended by his death.

(7) The woman, even though she allegedly relied upon the man's express promise eventually to buy her a house, apparently gave up nothing in reliance upon this promise.[24] (She alleged that she had given up her former accommodation in reliance upon his promise.)

(8) The child of the relationship, aged 15, had a possible alternative source of financial support from an action against the driver who had killed her father.

In vivid contrast is the case of *Tanner* v. *Tanner*[25] where the woman successfully recovered £2,000:

(1) The woman took the man's surname and was known in the district as "Mrs Tanner".

(2) The man had scarcely given any financial support to the woman and her twin babies by him over the three years of the relationship or thereafter.

(3) The woman was apparently a "faithful" mistress during the relationship and was apparently not consorting with other men.

(4) Apparently (though this is not clear from the reported facts), an award of £2,000 against the man would not leave him or his dependants destitute, as he had since married a woman who had a house of her own.

(5) The woman was claiming an interest in a small flat worth approximately £6,400, which was apparently not the man's only asset.

(6) The man was arguably "at fault" in terminating the relationship as he deserted his mistress and two young children to enter a new *de facto* relationship.

(7) The woman, relying upon the man's implied promise that the house was for her and the twin babies, gave up her rent-controlled flat.

(8) The two children of the relationship, aged 4, had only a limited possible alternative source of income if affiliation orders were obtained against the father.

Although others have pointed out the similarities of the facts in these two cases, the differences certainly seem sufficient to distinguish the cases, and to provide some degree of predictability (and even "justice"?).

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[24] *Id.* 239 *per* Megaw L.J.
[25] [1975] 1 W.L.R. 1346.

Thus, in cases involving a *de facto* spouse claiming some compensation out of, or an interest in, property, it is submitted that the answers to the following questions do provide a degree of predictability given the present pattern of judicial behaviour.

(1) How long has the relationship lasted?

(2) Did the parties plan to marry eventually but never quite get around to it?

(3) Have the parties cohabited, or is it more like a visiting arrangement?

(4) How many children have been born to the relationship? Who has looked after them?

(5) How well has the breadwinning spouse supported the dependent family over the years?

(6) Has the legal owner of the home made any express promises concerning the home or support of his *de facto* wife and family? How convincing is the evidence of these promises?

(7) Has the legal owner of the home been intentionally deceptive?

(8) How much money or unusual labour (or other acts of reliance) has the *de facto* spouse expended in reliance upon the legal owner's promises to compensate her? Has the legal owner stood by while these acts in reliance occurred, or has he knowingly accepted the benefit for himself?

(9) Is there any clear fault in the breakdown of the *de facto* relationship?

(10) How needy is the claimant spouse, and what is the legal owner's ability to pay?

(11) Will any third person suffer substantially if the claimant spouse is awarded some compensation or an interest in the property?

(12) Do the claimant *de facto* spouse and family have any other person or persons from whom they could claim some compensation or maintenance?

(In this list, the factors contained in questions (3) to (8) are probably the most important.)

Using questions like these, and weighing up the answers on either side of the scale, the writer submits that there has been a reasonable degree of predictability of *result*, at least to the extent of knowing whether the claimant will be denied any remedy, in English and Australian courts over the last seven years. However it should be noted that although one can arguably predict from the facts *whether* a claimant will succeed, predicting the extent of his/her success is far more difficult, even where judges use the same legal concepts.[26]

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[26] Note the variety of interests awarded in realty under contract, trust or proprietary estoppel concepts in family disputes: *Appleton* v. *Appleton* [1965] 1 All E.R. 44 (husband, half); *Jansen* v. *Jansen* [1965] 3 All E.R. 363 (husband, £1,000 interest); *Smith* v. *Baker* [1970] 2 All E.R. 826 (wife, half); *McRae* v. *Wholley*, 15 August 1975, unreported decision of Jones J., Supreme Court of Western Australia (wife, half); *Doohan* v. *Nelson* [1973] 2 N.S.W.L.R. 320 (husband, deferred whole interest); *Horton* v. *Public Trustee* [1977] 1 N.S.W.L.R. 182 (wife,

The recent cases of *Allen* v. *Snyder*[27] in the Court of Appeal of New South Wales and *Pascoe* v. *Turner*[28] in the English Court of Appeal, although using different language and concepts (trust and proprietary estoppel respectively), are quite compatible if one emphasises the *facts* and *result* of each in the light of the above questions. Thus, it is submitted that the war of words and concepts which has sometimes occurred between the appellate courts tends to mask a common set of principles apparently applied to the facts in many property disputes between *de facto* spouses.[29]

whole interest); *Olsen* v. *Olsen* [1977] 1 N.S.W.L.R. 189 (wife, whole interest); *Fraser* v. *Gough* [1975] 1 N.Z.L.R. 138 (male, one-third); *Cooke* v. *Head* [1972] 1 W.L.R. 518 (wife, one-third); *Eves* v. *Eves* [1975] 3 All E.R. 768 (wife, deferred quarter interest while maintenance paid); *Valent* v. *Salamon*, 8 December 1976, unreported decision of Holland J., Supreme Court of New South Wales (wife, 21.22%!!); *Pearce* v. *Pearce* [1977] 1 N.S.W.L.R. 170 (wife, lifelong irrevocable licence to occupy); *Tanner* v. *Tanner* [1975] 1 W.L.R. 1346 (wife, irrevocable licence to occupy until children reach 18 years); *Richards* v. *Dove* [1974] 1 All E.R. 88 (wife, no interest in house; basically half interest in furniture); *Leibrandt* v. *Leibrandt* (1976) F.L.C. 90-058 (wife, half); *Ogilvie* v. *Ryan* [1976] 2 N.S.W.L.R. 504 (wife, licence to occupy rent-free for life); *Hardwick* v. *Johnson* [1978] 2 All E.R. 935 (daughter-in-law, licence to reside undefined period); *Pascoe* v. *Turner* [1979] 2 All E.R. 945 (wife, whole); *Hohol* v. *Hohol* (1980) F.L.C. 90-824 (wife, half farm).

[27] [1977] 2 N.S.W.L.R. 685; Wade, "Trusts, The Matrimonial Home and *De Facto* Spouses" (1979) 6 University of Tasmania Law Review 97.

[28] [1979] 2 All E.R. 945 (Orr, Lawton, Cumming-Bruce L.JJ.); Sufrin, "Notes of Cases: An Equity Richly Satisfied" (1979) 42 Modern Law Review 574; also *Jackson* v. *Crosby (No. 2)* (1979) 21 S.A.S.R. 280.

[29] Wallace and Grbich, "A Judge's Guide to Legal Change in Property: Mere Equities Critically Examined" (1979) 3 University of New South Wales Law Journal 175; 194-204; Zuckerman, "Formality and the Family—Reform and Status Quo" (1980) 96 L.Q.R. 248; Wade, *De Facto Marriages in Australia* (1981).