

CASE LAW

THE RIGHT TO OCCUPY THE MATRIMONIAL HOME

GURASZ v. GURASZ

The law relating to the rights of joint tenants *inter se* is today fairly well defined. Each joint tenant has a right to occupy every part of the land.¹ If one joint tenant is expelled from the land by another joint tenant, the former can maintain trespass against the latter, provided that there was an actual ouster, or destruction of the subject matter of the tenancy.² A joint tenant has a right to alienate his interest, and s. 66G. of the Conveyancing Act 1921-1954 (N.S.W.) will assist him in this regard. However, where, as is commonly the case, the matrimonial home is held in joint tenancy by husband and wife, complications arise because the married state seems to carry with it considerations which go beyond the strict proprietary rights of the parties. It is proposed to explore these complications in the light of the recent decision of the Court of Appeal in England in the case of *Gurasz v. Gurasz*.³ The question whether one of the spouses is entitled to a right of occupancy of the matrimonial home where the home is in the sole ownership of the other will also be considered.

The Facts

The parties married in 1952. They had four children, aged from twelve to five years. In May, 1964, they bought a house as joint tenants, subject to mortgage. In October, 1967 the wife left the house taking the children with her. The wife alleged that the husband had been persistently cruel to her and the children, and that she had left because of his treatment of her. The report does not give any indications of what the alleged conduct was, but Denning, M.R. said that if the wife's story were true, she was quite justified in leaving the home with the children. After leaving the house, the wife found other accommodation which according to the evidence was "substandard". The husband continued to live in the matrimonial home.

After both parties had applied for custody of the children under the Guardianship of Infants Act 1886-1951 (U.K.), the wife applied under s. 1 of the Matrimonial Homes Act 1967 (U.K.)⁴ for an order that she be given leave to occupy the matrimonial home and that her husband's right to remain there be terminated.

¹G. C. Cheshire, *Modern Real Property* 5 ed. (1944) 550.

²*Ibid.*

³(1969) 3 W.L.R. 482.

⁴S. 1 of this Act was amended in 1970, but the substance of the provision has not changed.

The Decision

The Court of Appeal unanimously held that the Matrimonial Homes Act 1967 did not protect a wife who owned the property jointly with her husband. Denning, M.R. and Edmund Davies, L.J., Fenton Atkinson, L.J., *dubitante*, however, held that the wife had a common law right against her husband to occupy the matrimonial home to the exclusion of her husband.

Lord Denning, M.R. who gave the most thorough judgment relied on the authorities of *Shipman v. Shipman*,⁵ *Silverstone v. Silverstone*⁶ and a *dictum* of Lord Hodson in *National Provincial Bank v. Ainsworth*⁷ to support his decision. It is necessary to examine the first two of these authorities to find the justification for a decision which is contrary to the normal rules of joint tenants *inter se*.

The facts in *Shipman v. Shipman*⁸ were similar to those in *Gurasz's Case*⁹ except that in the former case the husband was still residing in the matrimonial home with his wife and children. The matrimonial home on this occasion was owned by the wife. The wife relied on s. 12 of the Married Women's Property Act 1882 (U.K.)¹⁰ in seeking an injunction to restrain her husband from continuing in occupation. The Court of Appeal (Pollock, M.R., Atkin, L.J. and Sargant, L.J.) was faced with two conflicting rights. On the one hand there was the wife's right to protection of property which was guaranteed by the Married Women's Property Act¹¹ and on the other hand there was the common law right of husband to live and cohabit with his wife. The Court of Appeal unanimously held that the right of the husband to live with his wife must give way to the right of the wife to protect her property because the husband by his conduct had forfeited his right to live with his wife. Whether the wife in these circumstances does have the right to exclude her husband depends on the conduct of the husband whereby "he would forfeit the privileged position he held previously and would be relegated to the position of any other person".¹² The Court of Appeal affirmed the trial judge's finding that there was conduct amounting to a matrimonial offence and therefore the injunction should be granted.

In *Shipman v. Shipman*¹³ there was a simple conflict of two distinct rights, the right of the wife to enjoy exclusive possession of her own property and the right of the husband to live with his wife. The situation in *Gurasz's Case*¹⁴ differed because the matrimonial home was there owned jointly. The husband not only had a right to live with his wife, but also a proprietary right in the home from which the Court was asked to exclude him. The question was not only the suspension of his right to live with his wife, but also the suspension of his common law right to occupation of the property which he owned jointly with his wife. The Court of Appeal in *Gurasz's Case*¹⁵ decided that in certain circumstances both rights can be suspended in favour of the wife. To support this proposition, Denning, M.R. relied on the judgment of Pearce, J. in *Silverstone v. Silverstone*¹⁶ which was a case heard under the Matrimonial Causes Jurisdiction.

⁵ (1924) 2 Ch. 140.

⁶ (1953) 1 All E.R. 556.

⁷ (1965) 2 All E.R. 472 at 477.

⁸ *Supra* n. 5.

⁹ *Supra* n. 3.

¹⁰ S. 16(1) Married Women's Property Act (N.S.W.) 1901.

¹¹ *Ibid.*

¹² *Shipman v. Shipman supra* n. 5 per Pollock, M. R. at 146.

¹³ *Supra* n. 5.

¹⁴ *Supra* n. 3.

¹⁵ *Ibid.*

¹⁶ *Supra* n. 6.

In *Silverstone v. Silverstone*¹⁷ there were cross-applications for injunctions pending the hearing of a judicial separation suit. The husband owned the matrimonial home. Pearce, J. granted an injunction restraining the husband from further occupying the matrimonial home:

In my view she has a right to be in the matrimonial home while a petition is pending before this Court, and this Court is entitled to protect that right and ensure that pressure is not put upon the wife to abandon her petition by evicting her from the house. In the present case I am satisfied that if I let the husband go back to the house, I am really driving her out.¹⁸

Pearce, J. came to the conclusion that at least in interlocutory proceedings in the Matrimonial Causes jurisdiction, the husband's common law right to occupy his land can be suspended in favour of the wife. The Court of Appeal in *Gurasz's Case*¹⁹ extended this to proceedings other than those under the Matrimonial Causes jurisdiction, and it is here that the Australian courts tend to part company. It will be necessary to have a brief look at similar decisions under the Matrimonial Causes jurisdiction in England and Australia to find the principles on which the courts will justify the suspension of normal common law proprietary rights.

Decisions under the Matrimonial Causes Jurisdiction

Most of the cases in which injunctions to restrain an owner/husband from occupying the matrimonial home have been granted, arose at the interlocutory level in the Matrimonial Causes jurisdiction. In both England and Australia the basis for ordering the suspension of this proprietary right is the conduct of the husband and the obligation of the husband to support his wife and children. Denning, M.R. in *Gurasz's Case*²⁰ considered that these two factors were relevant to the granting of the injunction, and he emphasised the obligation to maintain wife and children rather than the conduct of the husband as the more important consideration.

(a) Conduct of the Husband:

The courts are naturally reluctant to make any final judgment about the conduct of the parties in interlocutory proceedings, such as *Gurasz's Case*.²¹ An interesting aspect of this case is that neither the trial judge, nor the Court of Appeal made any finding about the conduct of the husband sufficient to justify the order given. For this reason Fenton Atkinson, L.J.²² was doubtful whether the order should be given until there had been a definite finding by the Court on the conduct of the husband. However he did agree that the order sought should be given since counsel for both sides had agreed that the case should be decided solely on the basis of a welfare officer's report. Fenton Atkinson, L.J. at least considered that the conduct of the husband was of paramount importance to granting the order.

One case cited in argument before the Court of Appeal in *Gurasz's Case*²³ but not mentioned in the judgments is the earlier Court of Appeal decision of *Gorulnick v. Gorulnick*.²⁴ In this case both parties continued to live in the matrimonial home which was owned by the wife, after the wife had presented a petition for dissolution of marriage on the ground of cruelty. She sought an order restraining her husband's continuance in the home pending suit.

¹⁷ *Ibid.* n. 3.

¹⁸ *Silverstone v. Silverstone*, *supra* n. 6 at 557.

¹⁹ *Supra* n. 5.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Gurasz v. Gurasz*, *supra* n. 3 at 489.

²³ *Supra* n. 3.

²⁴ (1958) 1 All E.R. 146.

Wallington, J. refused the order and this was upheld by the Court of Appeal who said that (a) the husband had not left the matrimonial home and it had not been shown that he was remaining in order to bring pressure on his wife to leave; (b) the husband had denied his wife's allegations and these issues could not be resolved on the application; (c) the wife had not proved in evidence the cruelty on which she relied (since the proceedings were interlocutory) and therefore the husband had not lost his matrimonial right of consortium.

In *Silverstone v. Silverstone*²⁵ Pearce, J. refused to make any finding on cruelty in the interlocutory proceedings in that case.

Australian Courts have shown a similar reluctance to make definite findings in interlocutory proceedings on the question of cruelty.

In *Taylor v. Taylor*²⁶ the matrimonial home was owned jointly and the wife and children had moved out, alleging cruelty on the part of the husband. Selby, J. sitting in the Matrimonial Causes jurisdiction of the New South Wales Supreme Court refused to grant an injunction restraining the husband from occupying the matrimonial home. The wife had already filed a petition for dissolution of marriage on the ground of cruelty, and Selby, J. considered that the family situation in the case before him was not such that it was imperative that the parties should live separately and apart prior to the hearing of the suit.

In *McKenzie v. McKenzie*²⁷ Wallace, J., sitting in the Matrimonial Causes jurisdiction of the New South Wales Supreme Court granted an injunction in favour of the wife, restraining the husband from occupying the matrimonial home, and ordering him to give up possession of the home to his wife. Wallace, J. made no finding on the cruelty allegations in the interlocutory proceedings.

Despite some dicta in *Shipman v. Shipman*²⁸ that it is the conduct of the husband which may result in the suspension of his proprietary right to occupy the matrimonial home, it seems that the proper view is that the injunction will be granted where the court is satisfied that the parties cannot possibly live together and to allow the husband to enter into or to continue occupation is tantamount to driving the wife out. This was the view taken by Pearce, J. in *Silverstone v. Silverstone*,²⁹ by Selby, J. in *Taylor v. Taylor*³⁰ and it seems that the Court of Appeal in *Gurasz's Case*³¹ was satisfied that the husband and wife could not live together under the one roof. Naturally any such conclusion must be based on the past conduct of the parties. In order to avoid making any definite findings on conduct in interlocutory proceedings, the judges generally see themselves as exercising a discretion either under s. 124 of the Matrimonial Causes Act 1959 or s. 16(1) of the Married Women's Property Act (1901) (N.S.W.) and their equivalents in England. These statutory provisions allow the courts a discretion in deciding conflicts between husband and wife, and in some circumstances the courts will decide in their discretion, that strict proprietary rights will not be enforced.

(b) Obligation to Maintain Wife and Children:

One of the main factors influencing the decision of the Court of Appeal in *Gurasz's Case*³² was the plight of the wife and children and their inability

²⁵ *Supra* n. 6.

²⁶ (1963) 5 F.L.R. 122.

²⁷ (1964-65) N.S.W.R. 54 (Wallace, J.).

²⁸ *Supra* n. 5.

²⁹ *Supra* n. 6.

³⁰ *Supra* n. 26.

³¹ *Supra* n. 3.

³² *Ibid.*

to find suitable alternative accommodation. Certainly Denning, M.R. seemed to emphasise the obligation of the husband to maintain his wife and children: "Some features of family life are elemental to our society. One is that it is the husband's duty to provide his wife with a roof over her head: and the children too".³³ In that case this obligation was best fulfilled by allowing the wife and children to occupy the home to the exclusion of the husband. The wife, moreover, as joint tenant had a common law right to occupy the home in any event. If the wife, because of the situation at home, was forced to leave, the husband could not adequately maintain her and the children. Therefore the only solution was to force the husband to leave.

In *McKenzie v. McKenzie*³⁴ Wallace, J. in granting the wife an injunction said, "I am satisfied that it is in the interests of the parties, particularly those of the children, that the petitioner and the respondent should, for the time being, live separately."

In *Doran v. Doran*,³⁵ another Australian case, Allen, J. refused to grant an injunction restraining the husband respondent from occupying the matrimonial home which was owned by the wife. He distinguished *McKenzie v. McKenzie*³⁶ on the ground that there questions of maintenance and suitable accommodation for the wife and children were paramount. In the case before him, Allen, J. said that the wife had suitable accommodation and she wanted the injunction so that she could sell the house which was occupied by the husband.

Despite some expressions of a contrary opinion³⁷ the cases cited above support the view that a court will protect a wife's right to occupy the matrimonial home, whether the home is owned solely by the husband, solely by the wife, or jointly, even to the exclusion of the husband. Although some common principles can be adduced from these cases to the effect that the wife's right to occupy the home to the exclusion of the husband depends on the conduct of the husband, and his obligation to maintain his wife and children, yet it is difficult to avoid the conclusion that the courts are often influenced by economic considerations.³⁸ If there is no reasonably suitable accommodation for either party, the court is faced with the dilemma of forcing them to live under the same roof, and perhaps aggravating the friction, or of turning one of them out without anywhere to go. On the other hand where both of the joint owners can be accommodated satisfactorily, the court will probably decide that one of them shall leave the family home. This certainly was a consideration in *Gurasz's Case*³⁹ and in the New Zealand cases of *Simpson v. Simpson*⁴⁰ and *Reeves v. Reeves*.⁴¹

The decision in *Gurasz's Case*⁴² is consistent with Australian cases in the Matrimonial Causes jurisdiction where proprietary rights alone give no useful or even fair criteria for deciding who is to occupy the family home. These rights only become important where there is a sale of the property or a division of the proceeds. In the cases sighted above, the proprietary rights seemed to be irrelevant to the actual decisions. Where *Gurasz's Case*⁴³ parts

³³ *Gurasz v. Gurasz*, *supra* n. 3 at 485.

³⁴ *Supra* n. 27.

³⁵ (1964) 6 F.L.R. 209.

³⁶ *Supra* n. 27.

³⁷ *Macrae v. Macrae* (1961) 78 W.N. (N.S.W.) 931 *per* Evatt, C.J. and Sugerman, J. at 932.

³⁸ A. Milner, "Possession of a Jointly Owned Home" 108 Law Journal 548.

³⁹ *Supra* n. 3.

⁴⁰ (1952) N.Z.L.R. 278.

⁴¹ (1958) N.Z.L.R. 317.

⁴² *Supra* n. 3.

⁴³ *Ibid.*

company with the Australian decisions is in applying the same principles in cases which are not heard under the Matrimonial Causes jurisdiction.

Decisions outside the Matrimonial Causes Jurisdiction

Australian courts tend to take more notice of strict proprietary rights where the proceedings between husband and wife are not under the Matrimonial Causes jurisdiction.

In *Lane v. Lane*⁴⁴ the wife was the sole owner of the premises. The husband was in occupation, but she was not. The wife took ejectment action against her husband and succeeded. The Supreme Court of New South Wales considered that the husband's common law right to live with his wife was immaterial.

On the other hand in *Henderson v. Henderson*⁴⁵ it was held that a husband does not have a common law action in ejectment against his wife. If he wishes to eject his wife, he must apply under s. 22 of the Married Women's Property Act 1901 (N.S.W.), and even then the Court may exercise its discretion in favour of the wife by allowing her to continue in occupation.

*Nilan v. Nilan*⁴⁶ approved of *Lane v. Lane*⁴⁷ and to some extent watered down *Henderson v. Henderson*⁴⁸ by vindicating the application of strict proprietary rights in proceedings other than those under the Matrimonial Causes jurisdiction.

Gavan Duffy, J. in *Olsen v. Davies*⁴⁹ described the wife's rights to remain in the matrimonial home owned by the husband in a negative fashion: ". . . I am not prepared to hold that where a husband and wife are living together in a house which he owns he has lost any possessory right except perhaps a general right to insist on his wife ceasing to live in the house". This general statement seems to mean that once a wife has left the home, even because of the conduct of the husband who owns the home, she cannot regain possession in proceedings outside the Matrimonial Causes jurisdiction. Consequently the statement by Denning, M.R. in *Gurasz's Case* that the wife in certain circumstances has a *common law* right to occupation cannot be taken as the law in Australia.

In a case where the matrimonial home is jointly owned, the wife's proprietary right to occupy the property will of course be protected, but it is unlikely that an Australian court would protect this right by excluding the husband, in proceedings outside the Matrimonial Causes jurisdiction.

The Position of a Wife with no Interest in the Home

Prior to *National Provincial Bank v. Ainsworth*⁵⁰ several English decisions,⁵¹ not followed in Australia⁵² tried to give the deserted wife some equity in the matrimonial home to assist her in hard cases, such as where the husband sold the home to his mistress who took with notice. These cases were definitively overruled by *National Provincial Bank v. Ainsworth*.⁵³ The House of Lords affirmed that the right of a deserted wife to remain in the matrimonial home which is the property of her husband was personal as against her husband, and did not give her any proprietary interest in the

⁴⁴ (1913) 30 W.N. (N.S.W.) 187.

⁴⁵ (1953) 68 W.N. (N.S.W.) 49.

⁴⁶ (1953) 68 W.N. (N.S.W.) 271.

⁴⁷ *Supra* n. 44.

⁴⁸ *Supra* n. 45.

⁴⁹ (1957) V.R. 183.

⁵⁰ *Supra* n. 7.

⁵¹ *Bendall v. McWhirter* (1952) 1 All E.R. 137, *Jess B. Woodcock & Sons v. Hobbs* (1955) 1 All E.R. 445, *Westminster Bank Ltd. v. Lee* (1956) Ch. 7.

⁵² *Dickson v. McWhinnie* (1958) 58 S.R. (N.S.W.) 179, *Brennan v. Thomas* (1953) V.L.R. 111, *Maio v. Piro* (1956) S.A.S.R. 233.

⁵³ *Supra* n. 7.

land. She has no rights against third parties, even if they took with notice of the situation.

Because the wife's right to occupy the matrimonial home is a purely personal one, the wife is in a very precarious position as Denning, M.R. pointed out in *Gurasz's Case*. However, Wilberforce, L.J. in *Ainsworth's Case*⁵⁴ said that the wife's disabilities were mitigated by three factors. First, the wife might be able to obtain an injunction to restrain her husband from contracting to sell the house so as to defeat her rights: *Lee v. Lee*.⁵⁵ Second, a sham or fraudulent sale can be set aside: *Ferris v. Weaven*.⁵⁶ Third, a disposition aimed at defeating a wife's right to maintenance can be set aside under the U.K. Matrimonial Causes Act.⁵⁷

While the third of these protections exists under s. 120 of the Matrimonial Causes Act 1959 in Australia, it is doubtful whether the other two would be supported.

In *Lee v. Lee*⁵⁸ the wife sought an order under s. 17 of the Married Women's Property Act (U.K.)⁵⁹ for an order restraining her husband from entering into any contract for the sale of the house which the husband owned alone. It was held that the injunction could be granted under s. 17. Somervell, L.J. said that if the court can make an order giving the wife exclusive possession of the home, then it must be able to restrict the husband's normal rights of property, including his right to dispose of it, in order to avoid the court's order being made a nullity. Cohen, L.J.,⁶⁰ Upjohn, L.J.⁶¹ and Wilberforce, L.J.⁶² in *Ainsworth's Case*⁶³ held that *Lee v. Lee*⁶⁴ was still good law. However, the New South Wales Full Court in *Macrae v. Macrae*⁶⁵ seemed to cast doubt on the principle. Evatt, C.J. and Sugerman, J. in the majority judgment refused to follow *Lee v. Lee*.⁶⁶ They approved *Dickson v. McWhinnie*⁶⁷ which had rejected the notion of a deserted wife's equity which will affect third parties under certain circumstances. This, of course, is in line with the House of Lords decision in *Ainsworth's Case*.⁶⁸ The Full Court also emphasised that a deserted wife's right is a purely personal one, which does not attach to any particular piece of property. This again is consistent with *Ainsworth's Case*.⁶⁹ Both the House of Lords and the New South Wales Full Court agreed that in proceedings under the Married Women's Property Acts⁷⁰ a court can order that a deserted wife have exclusive possession of the matrimonial home. Where the House of Lords differs is in extending this to proceedings other than those under the Married Women's Property Act and the Matrimonial Causes Act, so that a deserted wife's common law right to maintenance and accommodation can, in an appropriate case, attach to a particular piece of property, but then only as against the deserting husband.

⁵⁴ *Ibid.*

⁵⁵ (1952) 1 All E.R. 1299.

⁵⁶ (1952) 2 All E.R. 233.

⁵⁷ Matrimonial Causes (Property and Maintenance) Act 1958 (U.K.) s. 2.

⁵⁸ *Supra* n. 55.

⁵⁹ Married Women's Property Act (1901) (N.S.W.) s. 22(1).

⁶⁰ *National Provincial Bank v. Ainsworth*, *supra* n. 7 at 482.

⁶¹ *Id.* 485.

⁶² *Id.* 501.

⁶³ *Supra* n. 7.

⁶⁴ *Supra* n. 55.

⁶⁵ (1961) 78 W. N. (N.S.W.) 931.

⁶⁶ *Supra* n. 55.

⁶⁷ (1958) 58 S.R. (N.S.W.) 179.

⁶⁸ *Supra* n. 7.

⁶⁹ *Ibid.*

⁷⁰ Married Women's Property Act (1882) (U.K.); Married Women's Property Act (1901) (N.S.W.).

By affirming the decision in *Lee v. Lee*,⁷¹ the House of Lords extended this protection even further so that a deserted wife can by injunction restrain her husband from selling his own property, at least until such time as he provides her and the children with suitable alternative accommodation. The N.S.W. Full Court in *Macrae v. Macrae*,⁷² which was decided before *Ainsworth's Case*⁷³ refused to go that far, and held that a wife is not entitled to restrain her joint tenant husband from applying to the Equity Court for the appointment of trustees upon statutory trust for sale pursuant to s. 66G of the Conveyancing Act 1921-1954. A similar decision was reached by Bright, J. in *Peck v. Peck*.⁷⁴ In Australia it seems that in proceedings other than those under the Matrimonial Causes Act, the deserted wife's personal right to maintenance and accommodation is not strong enough to bring about even a temporary suspension of her husband's right to alienate his own property, whether that be owned solely, or jointly with his wife. Consequently, where the home is owned solely or jointly by the husband, the wife is powerless to prevent a sale. This was the situation which *Lee v. Lee*⁷⁵ tried to overcome, and which in *Thompson v. Earthy*⁷⁶ and *Macrae v. Macrae*⁷⁷ had unfortunate consequences for the wife.

The second protection given to the deserted wife, according to Wilberforce, L.J. in *Ainsworth's Case*,⁷⁸ rests on the authority of *Ferris v. Weaven*.⁷⁹ In that case a husband left his wife telling her that she could remain in the matrimonial home. Ten years later he conveyed the house to his brother-in-law, the plaintiff, for £30, which was never paid. The plaintiff, who was found to have entered into the transaction only to oblige the husband and to help him get possession, never exercised any acts of ownership. The husband continued to pay the rates and mortgage instalments. Jones, J. refused to make an order for possession, primarily because he considered himself bound by *Errington v. Errington*⁸⁰ and *Bendall v. McWhirter*,⁸¹ the latter of which was overruled by the House of Lords in *Ainsworth's Case*.⁸² However, Upjohn, L.J. in *Ainsworth's Case*⁸³ said that *Ferris v. Weaven*⁸⁴ could be justified on its facts, and Wilberforce, L.J. actively supported the decision.⁸⁵

The New South Wales Full Court in *Macrae v. Macrae*⁸⁶ expressed a different opinion about *Ferris v. Weaven*.⁸⁷ They said that *Ferris v. Weaven*⁸⁸ was wrongly decided unless it could be regarded as falling in a separate category. It is submitted that *Ferris v. Weaven* is in a separate category in that the sale was a sham, a collusive agreement designed to give to the husband indirectly advantages which he could not obtain directly under the Married Women's Property Act.⁸⁹ Such an agreement should not be enforced on the grounds of public policy.

⁷¹ *Supra* n. 55.

⁷² *Supra* n. 65.

⁷³ *Supra* n. 7.

⁷⁴ (1965) S.A.S.R. 293.

⁷⁵ *Supra* n. 55.

⁷⁶ (1951) 2 All E.R. 235.

⁷⁷ *Supra* n. 65.

⁷⁸ *Supra* n. 7.

⁷⁹ *Supra* n. 56.

⁸⁰ (1952) 2 All. E.R. 466.

⁸¹ *Supra* n. 51.

⁸² *Supra* n. 7.

⁸³ *National Provincial Bank v. Ainsworth*, *supra* n. 7. at 489.

⁸⁴ *Supra* n. 56.

⁸⁵ *National Provincial Bank v. Ainsworth*, *supra* n. 7 at 501.

⁸⁶ *Supra* n. 65.

⁸⁷ *Supra* n. 56.

⁸⁸ *Ibid.*

⁸⁹ P. Jeffrey, "The Last Word on Deserted Wives" 32 *A.L.J.* 105.

A further protection which may be available for a wife who has no proprietary interest in the matrimonial home is an implication in certain circumstances of a tenancy at will. The advantage of such an implication to a wife is that she may be able to rely on some of the protections given to tenants by the Landlord and Tenant (Amendment) Act 1948-1966. The House of Lords in *Ainsworth's Case*⁹⁰ did not mention the protection of a tenancy and the New South Wales authorities on the subject are conflicting. In *Roth v. Roth*⁹¹ there was a consent order for maintenance pending suit where divorce proceedings between the parties had already been instituted. The consent order provided for the husband to pay a certain sum for maintenance, and to allow the wife to occupy the matrimonial home which was owned by the husband. The husband was to pay all mortgage instalments and rates. Richardson, J. held that it was open to the jury to draw an inference that the wife had exclusive possession of the premises under a tenancy at will. On the other hand in *Stanley Thompson Investments Pty. Ltd. v. O'Donnell*,⁹² where there was a consent order similar to that given in *Roth v. Roth*,⁹³ Manning, J. held that the effect of the order was merely permissive and the conduct of the husband in permitting his wife to continue in occupation after the making of the order was not material from which an inference could properly be drawn that a tenancy had been created between them.

Assessments of maintenance pending suit by the Registrar in Divorce under the Matrimonial Causes Act 1959 are quite common. It is also very common to find an assessment made on the basis that the husband continue to allow the wife and children to occupy the matrimonial home. Consequently it is important to know exactly what the wife's legal position is. The decisions in *Roth v. Roth*⁹⁴ and *Stanley Thompson Investments Pty. Ltd. v. O'Donnell*⁹⁵ have not clarified the position.

Husband's Correlative Right

*Lane v. Lane*⁹⁶ and *Nilan v. Nilan*⁹⁷ held that the sole owner wife can bring ejectment against her husband. *Henderson v. Henderson*⁹⁸ held that a husband as sole owner cannot eject his wife at common law. Consequently even the mild protection given to deserted wives in *Henderson v. Henderson*⁹⁹ applies only to wives and it does not apply to a deserted husband.

It is doubtful whether there exists in New South Wales a right of a joint tenant wife to exclude her joint tenant husband from the matrimonial home in proceedings outside the Matrimonial Causes jurisdiction. This is what *Gurasz's Case*¹⁰⁰ decided and since a New South Wales court is unlikely to give such a right to a wife, it is even more unlikely to grant it to a husband.

On the other hand *Gurasz's Case*¹⁰¹ is consistent with Australian cases decided in the Matrimonial Causes jurisdiction. Consequently a further consideration is whether the husband has a correlative right in that jurisdiction.

If the conduct of the parties is the basis of the right to remain in exclusive occupation of the matrimonial home irrespective of the proprietary

⁹⁰ *Supra* n. 7.

⁹¹ (1961) 78 W.N. (N.S.W.) 510.

⁹² (1964) N.S.W.R. 1157.

⁹³ *Supra* n. 91.

⁹⁴ *Ibid.*

⁹⁵ *Supra* n. 92.

⁹⁶ *Supra* n. 44.

⁹⁷ *Supra* n. 46.

⁹⁸ *Supra* n. 45.

⁹⁹ *Ibid.*

¹⁰⁰ *Supra* n. 3.

¹⁰¹ *Ibid.*

rights of the parties, then it seems that the husband would have a correlative right. Such a right might arise where the matrimonial home is owned solely or jointly by a deserting and/or cruel wife, and husband has custody of the children of the marriage. The cases however do not support the view that the wife's right to remain in exclusive occupation derives solely from the conduct of the parties.¹⁰² Denning, M.R. in *Gurasz's Case*¹⁰³ emphasised the obligation of the husband to support his wife and children as giving rise to the wife's right of exclusive possession. However, at common law a wife does not have an obligation to support her husband and children.¹⁰⁴ In some circumstances under the Matrimonial Causes Act 1959, a wife may be ordered to pay maintenance to her husband, but these circumstances will be rare.¹⁰⁵ Consequently it is possible that the husband may have a correlative right to exclusive possession of the matrimonial home irrespective of proprietary rights, at least under the Matrimonial Causes Jurisdiction.

Conclusion

The decision of the English Court of Appeal in *Gurasz v. Gurasz*¹⁰⁶ is consistent with Australian decisions heard in the Matrimonial Causes jurisdiction. It is inconsistent with Australian decisions heard outside that jurisdiction. The English courts seem to have a more flexible concept of the common law than their judicial brethren in the antipodes. Consequently they tend to see marriage as having a more profound effect on the common law rights of occupation and alienation of one's own property. *Gurasz's Case*¹⁰⁷ decided that a joint tenant wife could occupy the matrimonial home to the exclusion of her husband. The grounds on which the Court reached this decision are broad, so that what emerges seems to be a discretion based on the total marriage situation. Wilberforce, L.J. in *National Provincial Bank v. Ainsworth*¹⁰⁸ certainly saw the court's function as being one of exercising a discretion. It is a discretion which is given by the common law.

The Australian Courts seem very reluctant to find any discretion in the common law to interfere, in the absence of statutory authority, with the right of an owner of property to occupy it, and to alienate it freely, despite his marital status. Where a discretion is given by statute, for example, the Married Women's Property Act or the Matrimonial Causes Act, then the exercise of that discretion will be on the same principles as were enunciated in *Gurasz's Case*.¹⁰⁹ The lesson to be learnt from this is that if one wishes to obtain in Australia the kind of order which was sought in *Gurasz's Case*,¹¹⁰ then it should be sought only in the Matrimonial Causes jurisdiction, or under the Married Women's Property Act.

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¹⁰² *Gurasz v. Gurasz*, *supra* n. 3; *Taylor v. Taylor*, *supra* n. 26; *McKenzie v. McKenzie*, *supra* n. 27; *Silverstone v. Silverstone*, *supra* n. 6.

¹⁰³ *Supra* n. 3.

¹⁰⁴ *Bullock v. Bullock* (1959) 76 W.N. (N.S.W.) 6; *Dempsey v. Dempsey* (1968) 11 F.L.R. 61.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Supra* n. 3.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Supra* n. 7.

¹⁰⁹ *Supra* n. 3.

¹¹⁰ *Ibid.*