Privy Council Appeal No. 39 of 1975

Dorothy Haldane – – – – – – – *Appellant*

v.

George Christopher Haldane – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11th OCTOBER 1976

Present at the Hearing:

LORD WILBERFORCE
LORD MORRIS OF BORTH-Y-GEST
LORD SIMON OF GLAISDALE
LORD KILBRANDON

[*Delivered by* LORD SIMON OF GLAISDALE]

This is an appeal from a judgment of the Court of Appeal of New Zealand (McCarthy P. and Richmond J.; Woodhouse J. dissenting), reported at [1975] 1 N.Z.L.R. 672, allowing an appeal from an unreported judgment of the Supreme Court (Wild C. J.). The appeal arises out of proceedings instituted by the appellant ("the wife") against her former husband ("the husband") under section 5 of the Matrimonial Property Act 1963. In those proceedings the wife sought an order that the husband should pay to her such sum as the court should think fair and reasonable from matrimonial property the legal title to which was vested in the husband.

The facts are fully reported in the judgment of Richmond J. The parties were married on 2nd December 1940, when they were both aged 19 years. There were five children of the marriage, born between 12th July 1941 and 6th March 1948. The parties at first lived with the husband's parents in their large family home at Hastings. The husband's father amongst other property owned a farm of approximately 112 acres some distance from his family home. It was worked on a limited basis below its capacity, the husband assisting. From about the end of 1940 until 1944 the husband served in the New Zealand armed forces, the wife moving about to be near him. After the husband's discharge his parents built a house for the parties on the farm and the parties went to live there with the three children who had been born by that time. His father transferred the farm to the husband, the latter taking over responsibility for a mortgage of $12,600 to the Public Trustee and in addition giving a mortgage to his father of $5,300. Woodhouse J. analysed the mortgage and other transactions relating to the farm and concluded that it could not be properly considered as a gift to the husband from his father. But

both parties in their affidavits described it as a gift; and their Lordships think that it would be proper to consider the transaction as a gift to the husband of an equity of redemption having some value—particularly as the reduced amount of the mortgage to the husband's father was eventually paid out of the husband's share in his father's estate (the mortgage to the Public Trustee had in the meantime increased). The husband worked and developed the farm, growing crops for a nearby canning factory. In the early years of the marriage the wife's time was fully devoted to caring for the children and managing the home. The wife claimed to have given some assistance with the farming business; but the learned Chief Justice dismissed this as minimal, with which the Court of Appeal agreed, as do their Lordships. The learned Chief Justice held that the wife's real contributions were her general domestic services and household management during the time that the marriage subsisted and the farm property developed. The affidavits disclose a history of domestic disputes, with separations in 1958, 1962 and 1969, and contain the usual recriminations to be expected consequent on such a history. The learned Chief Justice did not find it necessary to apportion blame; although he attached some weight to the fact that it was for their mother that the children testified. The final separation was in June 1969. Their Lordships were told from the Bar that at some time between the judgment of the learned Chief Justice in 1973 and the hearing before the Court of Appeal in October 1974 the parties had been divorced. After the separation the husband divided the farm property into five lots and sold four of them, including the one on which stood the former matrimonial home. By that time the land had greatly increased in value, partly reflecting a general increase in land values in the locality, partly increased demand from the canning factory. At the time of the original application the husband's assets were worth $118,500, of which $60,000 represented the value of the remaining lot from the original farm property. The husband also had two flats and a beach cottage and $8,300 in three bank accounts. The wife had no home, no savings and no assets; she was compelled to live with one or other of her children.

The crucial findings of the learned Chief Justice were that the value of the husband's assets would not have increased as much as they did without the husband's work; but that the fact that he did that work was contributed to by the wife's services and management and her general contribution as a wife and mother, the case being thus distinguishable from the decision of the Court of Appeal in *E. v. E.* (North P. and Turner J., Wild C. J. dissenting) [1971] N.Z.L.R. 859. The learned Chief Justice reminded himself of the origin of the property, and that (as laid down in *E. v. E.*) the onus of proof lay on the wife as claimant. He ordered that there should be vested in the wife a one-quarter share of the last lot of the farm property remaining in the husband's ownership and in addition ordered the husband to pay to the wife $4,000 (perhaps because that sum stood to the credit of the husband in his local bank account). The total value of the assets thus transferred to the wife was $19,000 out of the husband's assets worth $118,500.

The husband appealed to the Court of Appeal, who allowed the appeal by a majority. They held that they were bound by *E. v. E.* The learned President stated the propositions which he held to be established by *E. v. E.*, to which their Lordships will refer when discussing that case. But their Lordships think that the critical passage in *E. v. E.* which the majority of the Court of Appeal considered had been wrongly distinguished by the learned Chief Justice was from the judgment of North P. in *E. v. E.* at p. 885:

> " The mere fact that a wife has been a good wife and looked after her husband well domestically, cannot possibly, in my opinion, justify

an order being made in her favour in respect of a business owned by the husband in the running of which the wife had no share."

The Court of Appeal accordingly reduced the order in favour of the wife to $5,000, that representing the amount to be ascribed to the wife's domestic services in respect of the former matrimonial home.

The Court of Appeal subsequently granted leave to appeal to Her Majesty in Council, the Attorney General (so their Lordships were informed from the Bar) having certified for legal aid purposes that a question of law of exceptional public importance was involved.

The relevant provisions of the Matrimonial Property Act 1963 as they now stand are as follows, the provisions in square brackets having been added by the Matrimonial Property Amendment Act 1968:

"2. Interpretation—In this Act, unless the context otherwise requires,—

'Marriage' includes a former marriage; and 'party to a marriage' has a corresponding meaning:

'Property' includes real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest.

. . .

5. Property disputes—(1) In any question between husband and wife as to the title to or possession or disposition of property (including any question as to investment by one party of money of the other without consent) the husband or the wife, or any person on whom conflicting claims are made by the husband and wife, may apply to any judge of the Supreme Court or, subject to the provisions of subsection (4) of this section, to a Magistrate's Court.

(2) On any such application the Judge or Magistrate may make such order as he thinks fit with respect to the property in dispute, including [but without limiting the general power conferred by the foregoing provisions of this subsection] any order for—

(*a*) The sale of the property or any part thereof and the division or settlement of the proceeds; or

(*b*) The partition or division of the property; or

(*c*) The vesting of property owned by one spouse in both spouses in common in such shares as he thinks fit; or

(*d*) The conversion of joint ownership into ownership in common in such shares as he thinks fit;—

and may make such order as to the costs of and consequent upon the application as he thinks fit, and may direct any inquiry touching the matters in question to be made in such manner as he thinks fit.

(3) Subject to the provisions of subsection (2) of section 6 of this Act, the Judge or Magistrate may make such order under this section, whether affecting the title to property or otherwise, as appears just, notwithstanding that the legal or equitable interests of the husband and wife in the property are defined, or notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property.

. . .

(7) In this section and in [sections 5A, 6, 7, 8, and 8A] of this Act the terms 'husband' and 'wife' include the legal personal representatives of the husband or wife [and also include the parties to a former marriage and the parties to a purported marriage that is void].

6. Matters to be considered by Court—(1) In considering any application under section 5 of this Act, the Judge or Magistrate shall, where the application relates to a matrimonial home or to the division of the proceeds of the sale of a matrimonial home, and may in any other case, have regard to the respective contributions of the husband and wife to the property in dispute (whether in the form of money payments, services, prudent management, or otherwise howsoever).

[(1A) The Judge or Magistrate's Court may make an order under section 5 of this Act in favour of a husband or wife, notwithstanding that he or she made no contribution to the property in the form of money payments or that his or her contribution in any other form was of a usual and not an extraordinary character.]

(2) The Judge or Magistrate shall not exercise the powers conferred upon him under [subsection (2) or] subsection (3) of section 5 of this Act so as to defeat any common intention which he is satisfied was expressed by the husband and the wife.

[6A. Relevance of conduct—On any application under section 5 of this Act, the Judge or the Magistrate's Court, as the case may be, in determining the amount of the share or interest of the husband or the wife in any property or in the proceeds of the sale thereof, shall not take into account any wrongful conduct of the husband or the wife which is not related to the acquisition of the property in dispute or to its extent or value.] "

The statute is extraordinarily difficult to construe, as can be seen by the great diversity of judicial opinion that it has evoked. Section 5 (1) and (2) derive ultimately from section 20 of the New Zealand Married Women's Property Act 1884 (subsequently re-enacted with amendments immaterial to this appeal, the last occasion being section 19 of the Married Women's Property Act 1952). These enactments correspond to section 17 of the English Married Women's Property Act 1882. The latter was finally construed in *Pettitt v. Pettitt* [1970] A.C. 777 as being a purely procedural provision, enabling property disputes between husband and wife to be decided summarily, but giving no general authority to the court at its discretion to vary proprietary or possessory rights vested in one spouse in favour of the other according to what in all the circumstances justice might seem to demand. The corresponding New Zealand provisions had been earlier but similarly construed. As Woodhouse J. said in *Hofman v. Hofman* [1965] N.Z.L.R. 795, 797/22:

> " There is a consistent line of authority to the effect that the section does not permit questions of title to property to be decided except in accordance with the strict legal or equitable rights of the parties: "

(citing reported cases between 1946 and 1960). But section 5 (3) of the 1963 Act, a completely new provision, is obviously inconsistent with this line of authority—must, indeed, have been intended to abrogate it. What did Parliament intend to substitute? Some sort of community of property between husband and wife? An unfettered discretion in the court to make such provisions as are just, having regard to the different sort of contribution which husband and wife respectively make in the marriage relationship with respective repercussions on property acquisition? Is section 6 intended to limit the discretion apparently given by section 5 (1) and (2) as now to be read in the light of section 5 (3)—i.e., insofar as the court can override strict legal or equitable rights, is it limited to doing what is necessary to vindicate the " contribution " of the other spouse? What sort of " contribution " is envisaged? May it be an indirect " contribution ", such as arises from the fundamental division of labour between husband and wife, whereby the ordinary housewife, by bearing children, rearing them during early

childhood, managing the household, etc., releases the husband to make proprietary acquisitions? Does a "contribution" *in* the matrimonial home (e.g., by domestic services or prudent management) amount to a contribution *to* the matrimonial home? If so, can such "contribution" *in* the matrimonial home be regarded also as a "contribution" *to* property outside the matrimonial home? And again if so, what property? In the case of a farm, does the matrimonial home extend to the whole land—or, if not, how is it to be defined? Is the court limited to an "asset by asset" approach, or can the court consider all the property the legal or equitable title of which is in either husband or wife or both jointly? Is there any property which lies outside the purview of a court whose jurisdiction is invoked under section 5? What is the relationship of the Matrimonial Property Act 1963 to the Matrimonial Proceedings Act 1963? What construction best accords with the provision of the Acts Interpretation Act 1924, section 5 (*j*):

> "Every Act, and every provision or enactment thereof, shall be deemed remedial, . . . and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit: "?

This provision seems to give statutory force to the common law canon of construction which generally goes by the name of "the rule in *Heydon's Case*" ((1584) 3 Co. Rep. 7a). Their Lordships therefore first approach the construction of this difficult statute by endeavouring to ascertain what was conceived to be wrong with the New Zealand matrimonial property law before 1963.

By and large the common law vested all a married woman's property in her husband, giving her in part return the general right to pledge her husband's credit (if any) for necessaries. The Court of Chancery developed the institution of the married woman's separate property in equity. But this remedy extended only to those women with landed or investment property. It did not help, for example, women with professional earnings. A vociferous and articulate group of such women in the circle of John Stuart Mill prompted the passing of the English Married Women's Property Acts of 1870 and 1882 (the latter being followed by the New Zealand Act of 1884). But by the middle of this century it was widely held that these measures were inadequate to secure justice to the generality of married women, who have neither land, investments nor professional earnings: Woodhouse J. in *Hofman v. Hofman*, at p. 798, set out some of the indications of this realisation. Marriage had come to be regarded as a partnership of equals, even though the equal partners performed widely different functions.

> "In the nature of things the wife's contribution to the family welfare has usually had a domestic rather than a money importance."

(Woodhouse J. in *Hofman v. Hofman* at p. 798/38). By performing her function of home-minder, the wife releases her husband to perform his function as breadwinner. So long as private property is regarded by society as an institution of social value (constituting a sphere within which the individual can make direct choices affecting his or her own life), a law that enabled a husband to claim as his exclusive property all the bread left over from immediate consumption, while vouchsafing to the wife only whatever crumbs she managed to scrape together by her own fortuitous and rare economic activity supervening on her domestic duties, was denying *pro tanto* the concept of marriage as a partnership of free equals in which the partners performed complementary functions. Yet before 1963 that was the law as construed in the New Zealand Courts—a construction in accord with the later decision of the House of Lords in

Pettitt v. Pettitt. Other legal systems had developed various forms of community of property to provide for this problem; but none seems to have given entire satisfaction in the societies which have adopted them (see Lord Reid in *Pettitt v. Pettitt* at p. 795 C). But here was a mischief which called for a remedy.

A second, closely associated, tendency in the law preceding the 1963 Act also helps in its construction. A number of decisions in the English Court of Appeal attempted to deal with the problem referred to in the previous paragraph. They did this by reading section 17 of the English Married Women's Property Act 1882 (cf. section 19 of the New Zealand Act of 1952) as giving to the court an unfettered discretion to make such property adjustments between the spouses as might be just (including overriding the legal and equitable interests of the spouses so as to take cognisance of the functional division of co-operative labour between husband and wife). For example, see Denning L. J. in *Hine v. Hine* [1962] 1 W.L.R. 1124; [1962] 3 All E.R. 345, cited by Woodhouse J. in *Hofman v. Hofman* at p. 797/37. *Pettitt v. Pettitt* ultimately showed that this attempted avenue of escape was a false trail, and in any case it was blocked in New Zealand by decisions which anticipated *Pettitt.* But these decisions in the English Court of Appeal must have been within the contemplation of the New Zealand Parliament in enacting, before *Pettitt v. Pettitt,* the 1963 Act, especially section 5 (3).

A third matter also helps to ascertain what remedy the New Zealand Parliament provided for what it must have conceived to be a defect in the law. The spouses' functional division of co-operative labour enables the husband to make a proprietary accumulation. Yet for 150 years and more the common law allowed to the husband an unbridled testamentary licence over the accumulation; so that the wife whose economic self-abnegation had enabled him to make it might be left penniless in widowhood. The New Zealand legislature was the first in the Commonwealth to recognise this mischief and provide for its remedy. It might have done so by adopting the Scottish *jus relictae* (or variants from other civil law systems), whereby the widow is entitled to an inalienable part of her deceased husband's estate. But the New Zealand Parliament adopted a different approach. By the Family Protection Act 1908 it gave to the court, where a husband had failed to make reasonable testamentary provision for his widow, an unfettered discretion to make reasonable provision for the widow out of the estate of the deceased. It seems likely that it was felt that such a flexible method best suited the multifarious circumstances which arise within the generality of the marriage relationship. This precedent could hardly have been absent from the parliamentary mind when in 1963 it sought to deal with a similar situation *inter vivos,* involving freeing the law of matrimonial property from the shackles of strict legal and equitable rights.

Before essaying their own construction of the 1963 Act, their Lordships would add a fourth introductory consideration. The instant parties' marriage lasted some 29 years. The wife bore five children within seven years. She has now no home, no savings and no assets. She is obliged to live with one or other of her children. She has half the income from a small trust fund established by her mother-in-law, and a maintenance order of $50 a week. The husband has gone off to live with another woman. His assets amount in value to $118,500. The judgment of the learned Chief Justice in effect gave the wife just under one-sixth of this. McCarthy P. doubted whether the wife had established any claim at all; but, adopting a benevolent approach, finally concurred with Richmond J. that $5,000 was an appropriate order (leaving the husband with $113,500). The Court of Appeal was, of course, bound by *E. v. E.* But the resultant disparity of means in itself raises some doubt whether a construction which produces it can really represent the parliamentary intention.

The 1963 Act has been frequently before the New Zealand courts. Though many of the reported decisions contain valuable insights, their Lordships propose to refer only to a few crucial ones.

The line of reasoning in *Hofman v. Hofman* has been sufficiently indicated. Woodhouse J. came to the conclusion that it was the intention of the New Zealand Parliament to abrogate the decisions construing what is now section 5 of the 1963 Act as purely procedural and not entitling the courts to override strict legal or equitable interests of the parties. The effect of the new section 5 (3) was that such legal or equitable interests could be overridden. The intention was to leave the court with an unfettered discretion (subject only to section 6 (2)) to make such order as does justice between the parties in all the circumstances—recognising that in the nature of things the wife's contribution to the marriage partnership is generally domestic. The resulting moral claim of the wife could be vindicated by the unfettered discretion of the court to make such order as should be just.

It will be apparent that Woodhouse J. adopted the approach indicated in section 5 (*j*) of the Acts Interpretation Act, construing the Matrimonial Property Act in the light of the apparent defect in the previous law and so as to advance the remedy which he adjudged Parliament had supplied. The Court of Appeal, in upholding Woodhouse J.'s order in *Hofman v. Hofman*, did not need to conclude whether the learned judge's liberal interpretation, with its supporting reasoning, was correct: that was to be left to another case raising the issue more broadly. But Woodhouse J.'s approach in *Hofman v. Hofman* was followed without demur by judges at first instance in a great number of cases.

Keswick v. Keswick [1968] N.Z.L.R. 6 is, in their Lordships' view, of great importance in construing the 1963 Act as it now stands, since an amendment made, it would seem, in consequence of *Keswick v. Keswick* throws a powerful light on the parliamentary intention. It was an application by a wife for the definition of her interest in the former matrimonial home (which was in the name of the husband and had increased considerably in value since its acquisition) and for an order vesting the property in both parties in such shares as the court should think fit. The order of Tompkins J. reflected both the wife's financial contribution and her domestic services. Having assessed that part of the contribution which could be measured in money, Tompkins J. went on (p. 7/33–36, 47–49):

> "But the evidence shows that she also made a substantial contribution by way of her thrifty and frugal housekeeping, which allowed a greater proportion of the respondent's earnings than would otherwise be the case, to be used in buying materials for the house . . . she contributed by her cash contributions or her services approximately one-fourth of the cost of the house over and above . . . the mortgage."

The wife, however, was in desertion, which led Tompkins J. to say (p. 8/40):

> "This fact is relevant in considering whether the justice of the case demands that the applicant be given a larger interest than her contributions in money *or services* would warrant. I do not think, having regard to all the circumstances, that this is a case where I should award her *more than would be justified by the extent of her contribution.*" (Our italics.)

So the learned judge made an order reflecting the wife's contribution (monetary and by way of domestic service), but refused to order more in view of her matrimonial offence. It must have been this decision which occasioned the amendments made by the Matrimonial Property

Amendment Act 1968, which inserted sections 6(1A) and 6A into the Act. This shows, in their Lordships' view, that the legislature intended that the usual domestic contributions of an ordinary housewife, and not only the exceptional contributions of a thrifty and frugal one, were for consideration. The implications of this are in themselves of great help in construing the Act. But, in addition, reading the amendments in the light of *Keswick v. Keswick*, the justification for such a consideration seems to be that, in the eye of the legislature, a wife's domestic contribution "allowed a greater proportion of [the husband's] earnings than would otherwise be the case to be used" to augment the husband's assets. If this is right, it goes far to vindicate the reasoning of Woodhouse J. in *Hofman v. Hofman.*

E. v. E. was analysed in the instant case by McCarthy P. in six propositions reported at [1975] 1 N.Z.L.R. 673/41—675/18, from which the learned President inferred a seventh which will be stated in due course. Their Lordships summarise these propositions further, italicising for ease of reference matters which will be the subject of subsequent comment.

(1) Section 5(1) is directed solely to the determination of disputes regarding identifiable items of real or personal property, and the court must consider each item individually before it can make an order in respect of it. (Their Lordships refer to this as the "*asset by asset*" approach.) The "*community of surplus*" approach must be rejected.

(2) Except in those cases where a right enforceable at law or in equity exists independently of the Act, a spouse's *claim must be based on contributions* and an award can be made only if *and to the extent that* the claimant spouse establishes contribution. McCarthy P. added that, though section 6(1A) does not distinguish between the classes of contributions which may be taken into account in respect of a claim to a share in the matrimonial home, on the one hand, and to a share in other assets, on the other, it is proper to take a *more benevolent attitude* in favour of a wife when she claims in respect of a matrimonial home, and perhaps also of some other aspects which can fairly be regarded as "family" assets. So, though the onus lies on a wife to establish her claim, including a claim to a share in the matrimonial home, most judges quite rightly will not be over-ready to hold the burden of proof unsatisfied in a *matrimonial home claim* by a wife *who has performed her matrimonial responsibilities with credit.*

(3) A spouse should not be entitled to share in the other's business interests unless it is shown that they both have carried on the business "more or less jointly": so that the fact that the wife had been a good wife looking after her husband well domestically should not itself justify an order in respect of those business assets. McCarthy P. added that "more or less jointly" was not meant to be "heavily technical", so that a wife *who had deliberately accepted a reduction in her standard of living* in order to make more money available for employment by the husband in his business activities with consequent growth in his assets would have a claim. There might be cases, too, when the court, exercising its discretion in claims in respect of a husband's business assets, might have regard to the assumption of domestic responsibility in *some special or unusual way* if that form of contribution resulted in freeing the husband to add to his assets.

(4) As regards a claim relating to the matrimonial home the court is obliged to have regard to the claimant spouse's contributions; whereas in relation to other assets the court has a discretion. McCarthy P. noted the complication when the matrimonial home is a *farmhouse.* He said:

> "The Court must act in a common-sense way and include so much of the total land holding as can fairly be said to be used for domestic purposes associated with the home in contrast with that used mainly for farm activities."

(5) The Court is given the widest discretion in the form of order it makes. *E. v. E.* should not be understood to convey any doubt as to this; but should be understood as meaning in this regard that the powers given by section 5(2) should not be used as conferring a like jurisdiction to that covered by the *Matrimonial Proceedings Act*: the general purposes of the two Acts are different, and these differences should be maintained.

(6) The Court may take relevant *wrongful conduct* into account in determining both the form *and the extent* of the order.

Having set out the six propositions which he deduced from *E. v. E.* and which their Lordships have summarised, McCarthy P. added a seventh (p. 675/19):

> "I see no justification . . . for allowing a spouse an interest in property obtained by the other by way of *gift or inheritance* during the marriage, unless it be established that both spouses were intended to be beneficiaries . . . There is an exception to this; the case where the claimant spouse can show that by his or her contributions in one form or another he or she has contributed to the retention of a property received by way of gift or to some increase in its extent of value."

It seems likely that the restrictive interpretation of the Act in *E. v. E.* caused some misgiving, because in *Gleeson v. Gleeson* (August 6th 1975) Richmond J., delivering the judgment of the Court of Appeal, said:

> "Any limitations of the court's power to do justice under the Matrimonial Property Act which may be thought to flow from *E. v. E.* do not necessarily apply if resort is also had to the Matrimonial Proceedings Act . . . The two statutes are linked and complementary".

Richmond J. made similar observations in the instant case: he said (p. 682/44):

> "The provisions of the Matrimonial Proceedings Act . . . enable the Supreme Court not only to award periodic maintenance but also to award a capital sum in suitable cases."

This matter is of such importance in relation to the construction of the Matrimonial Property Act that their Lordships think it right to comment on it right away. First, a capital payment or settlement of property can only be ordered after a decree of divorce (section 41 of the Proceedings Act) or other matrimonial proceedings (section 48). It seems unlikely that Parliament would wish to place a wife who stood by her marriage in a less favourable position proprietorially than one who has recourse to matrimonial proceedings. Secondly, a matrimonial home order (section 58 of the Proceedings Act) cannot be made even after an order for restitution of conjugal rights (Proceedings Act, section 65(2)), but only after an order in proceedings in derogation of marriage. Thirdly, proceedings under the Property Act may be taken by the legal personal representative of the spouse (Property Act, sections 2 and 5(7)), and a personal representative of a deceased spouse cannot have recourse to the Proceedings Act. Fourthly, in proceedings under section 41 of the Proceedings Act (capital sum or settlement of property) the court must have regard to any contribution of the wife to the assets of the husband, whether in the form of financial assistance or otherwise (section 43(c)). (For a matrimonial home order under section 58 a *substantial* contribution

is required.) If therefore contribution founds the jurisdiction of the court and/or limits the extent of the order made under the Property Act, it is difficult to avoid the conclusion that it does so also under section 41 of the Proceedings Act. For all these reasons, in their Lordships' view, it follows that if the Property Act is so construed as to produce injustice to a wife, there is no easy avenue of escape by recourse to the Proceedings Act. The legislature is presumed to intend justice. The Property Act must stand on its own feet in this regard: it cannot rely on the Proceedings Act as a crutch.

It is against this background that their Lordships can proceed to construe the Matrimonial Property Act. But before doing so their Lordships can dispose of one matter summarily. They are entirely in agreement with the Court of Appeal in the instant case, which followed *E. v. E.* in this as in other regards, that the Act does not institute any sort of formal regime of community of property.

In the instant case the Court of Appeal followed, as it was bound to, the previous case of *E. v. E.* But it will be clear from the summary given earlier of McCarthy P.'s statement of the principles deducible from that case that, where he could, he stated them in such a way as to mitigate their harshness to wives and to give greater flexibility. However, in so doing, he necessarily underlined some matters in which *E. v. E.* might be open to criticism. For example, as McCarthy P. himself recognised, the fact that a court *must* have regard to contributions in relation to the matrimonial home and *may* have regard to contributions to other than " family assets " gives no real ground for the view that

> " too much regard should not be had to the way the legal or equitable interests of the husband and wife *to the matrimonial home* have been defined " (*E. v. E.* at p. 885: our italics)

or that a lower standard of proof may be imposed on a wife claiming a share in the matrimonial home than in other cases. Then the statement that in claims *in respect of a husband's business assets* the courts may have regard to the assumption of the domestic responsibility *in some special or unusual way* if that form of contribution resulted in freeing the husband to add to his assets seems to run directly counter to section 6(1A), which applies quite generally to claims made under section 5. Their Lordships feel more difficulty as to the observations of McCarthy P. that

> " an award can be made only if *and to the extent that* the claimant spouse establishes contributions " (p. 673/49).

The learned President recognised that this was not said explicitly in *E. v. E.* But their Lordships agree that it is nevertheless implicit. If contributions are to be a limitation on jurisdiction, it would be absurd if they were not also a limitation on the resultant order—that if a wife had made no relevant contribution she should get nothing, whereas if she made some relevant contribution she could get the lot.

This, indeed, raises the central issue whether contribution is in truth a limiting factor or whether it is merely one of the matters which the court may or must consider. The other central issue is whether the Act imposes an " asset by asset " approach. Their Lordships think that the key to both these questions lies in the amendments made in 1968 in consequence of *Keswick v. Keswick,* considered against the general background to the Act which their Lordships set out near the commencement of this opinion.

If section 6(1) stood unmodified by section 6(1A) their Lordships can see a strong argument that the contributions referred to are merely one of the matters to be considered by the courts, neither confining

the jurisdiction of the court nor limiting the extent of the order, particularly in view of the fact that in relation to assets other than the matrimonial home the court need not have regard to contributions; and their Lordships have already indicated that this receives some support from the 1968 amendments viewed against the language of judgment in *Keswick v. Keswick*. But the reiteration of the word "contribution" in section 6 (1A) on the whole indicates that contribution in some form is a prerequisite for an order. Their Lordships in this respect agree with the majority of the Court of Appeal in *E. v. E.* and the instant case.

On the other hand, supervening as section 6 (1A) did on *Keswick v. Keswick*, it is, their Lordships think, clear that a contribution ranks for consideration even though it is that of an ordinary housewife in her domestic sphere. It is not difficult to see the reason for this as regards the matrimonial home. The wife's performance of ordinary housewifely duties makes no *direct* contribution to the acquisition or enhancement in value of the matrimonial home. It is nevertheless an *indirect* contribution to its retention as an asset within the family: the husband would otherwise either himself have to perform such domestic duties, to the detriment of activities more immediately profitable financially, or he would have to pay someone else to perform them, to the *pro tanto* diminution of his assets. To sum up here, the wife's performance of domestic duties *in* the matrimonial home was regarded by the legislature as a contribution *to* the matrimonial home. Their Lordships agree with the Court of Appeal in *E. v. E.* and in the instant case in this regard too. But once it is accepted that performance of domestic duties *in* the matrimonial home is to be regarded as indirect contribution *to* the matrimonial home, the answers to three other difficult questions of construction become clearer.

First, the reasons why the wife's performance of ordinary domestic duties *in* the matrimonial home are to be regarded as contributions *to* the matrimonial home apply equally to assets other than the matrimonial home. The difference is that the court *must* consider them as regards the matrimonial home, but only *may* consider them as regards other assets. This differentiation may reflect a parliamentary feeling that a wife's contribution in the matrimonial home merits special consideration partly because the matrimonial home is peculiarly the wife's sphere of activity and therefore of particular importance to her, partly perhaps because in many cases the matrimonial home will be the principal asset. Their Lordships would add that the legislature evidently considered that this domestic contribution of the wife should be considered in relation to the matrimonial home notwithstanding that it might have come to the husband by way of gift or bequest.

The second question of construction can now be answered. As regards assets other than the matrimonial home, the discretion as to whether contribution should be regarded is, subject to section 6 (2), quite unlimited. There is, however, one rider to be made to this. It follows from the facts that the Act does not institute a regime of community of property and that the legislature particularly directed the consideration of the court to contribution, that there will be some property which lies outside the jurisdiction of the court—namely, property to the acquisition, preservation or enhancement of which a spouse made no contribution at all either direct or indirect (i.e., by releasing the partner for its acquisition etc). Assets such as tiaras were canvassed in argument; but these may or may not fall within the scope of the Act, and are hardly in any event everyday assets. Their Lordships think that a more illuminating illustration might be the award of compensation to a spouse in civil proceedings for pain and suffering or for loss of amenities. Such an award would, at least immediately, fall outside the scope of the Act.

The conclusion that performance of ordinary domestic duties *in* the matrimonial home was intended by the legislature to fall for consideration as a contribution *to* the matrimonial home, and the inference that it might also fall for consideration as a contribution to assets other than the matrimonial home, enables yet a third question of construction to be answered. It means that, apart from such assets as fall by their nature outside the Act, and apart from the necessary separate consideration of the matrimonial home and any other assets, there can be no justification or foundation for an "asset by asset" approach. It is, indeed, more immediately, incompatible with the legislative vindication of the moral rights arising from the functional division of labour between husband and wife which is implicit in the proposition that the court *may* consider the ordinary domestic contribution of a usual housewife towards assets other than the matrimonial home. The unfettered discretion of the court to make (subject to section 6 (2) and regard to contribution) such order as is just is emphasised by the 1968 amendment to section 5 (2).

There are three final general matters which arise before their Lordships turn back to the application of the Act to this case itself.

First, there is the situation where parties live on a farm. It is sufficient to say that their Lordships respectfully agree with the way that the matter was dealt with by McCarthy P. at p. 674/45. Their Lordships cannot see any reason for treating a farming enterprise differently from any other economic enterprise.

The second is the way that gifts or bequests fall to be treated under the Act. It is implicit in the rejection of the "community of surplus" concept that they may fall outside the Act. It is implicit in the rejection of the "asset by asset" approach and the conclusion that "contribution" extends to indirect contribution towards retention of an asset that they may fall within the Act. How they are to be taken into account depends on the facts of the particular case. Initially a gift or bequest to one spouse only is likely to fall outside the Act, because the other spouse will have made no contribution to it. But as time goes on, and depending on the nature of the property in question, the other spouse may well have made a direct or indirect contribution to its retention.

Thirdly, their Lordships see no reason to question the sixth proposition established by *E. v. E.* as stated in the judgment of McCarthy P.; but would venture to expatiate somewhat upon it. Wrongful conduct cannot be taken into account in determining either the form or the extent of the order of the court unless such wrongful conduct relates to the acquisition of the property in question or (which will be more usual) its extent or value (see section 6A). It follows that such matrimonial misconduct as adultery or cruelty or desertion will generally be irrelevant to any order made under the Matrimonial Property Act. On the other hand, such misconduct as sluttishness or extravagance on the part of a wife or reckless gambling by a husband could be taken into account where it has had a direct or indirect effect on the family fortunes. Their Lordships would venture to add, though, that this sort of misconduct would have to be gross and palpable to affect the order of the court; courts exercising jurisdiction under the Matrimonial Property Act are unlikely to be impressed by the raking up of the minutiae of ancient domestic grievance.

It remains to apply the foregoing construction to the instant case. The learned Chief Justice held himself to be bound by *E. v. E.*, which their Lordships think placed too restrictive an interpretation on the Act. Nevertheless, he does seem, in an extemporary judgment, to have weighed and exercised his discretion in relation to all the relevant factors. In particular, he reminded himself of the origin of the property. His final order seems to their Lordships a just one; and in any case there was no appeal against it by the wife.

Some question has arisen as to the proper form of the order; but counsel were agreed that, if the judgment of the learned Chief Justice were substantially to be reinstated by the Board, the most convenient form of order would be for the husband to execute a charge for $19,000 in favour of the wife over his property generally. Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed, the order of the Court of Appeal set aside, and the matter remitted to the Supreme Court with a direction that that Court vary accordingly the order which was made pursuant to the Chief Justice's judgment. The husband must pay the costs of the appeal to the Court of Appeal and of this appeal.

3169447—2 Dd 119907 90 11/76

In the Privy Council

DOROTHY HALDANE

v.

GEORGE CHRISTOPHER HALDANE

DELIVERED BY
LORD SIMON OF GLAISDALE

Printed by HER MAJESTY'S STATIONERY OFFICE
1976