

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

DIV. 21/93

BETWEEN: BETTY ELISARA of Vaivase-
uta, Married Woman

Petitioner

A N D: MATAESE ELISARA of
Vaivase-uta, Consultant

Respondent

A N D: NETI KERISOMA of
Vaisigano, Secretary

Co-Respondent

Counsel: P.A. Fepuleai for petitioner
L.S. Kamu for respondent

Hearing: 23 & 26 August 1993

Judgment: 22 November 1994

JUDGMENT OF SAPOLU, CJ

During the hearing of this case, four broad issues emerged for decision by the Court. These are the petition for divorce on the ground of adultery, division of the matrimonial properties, custody of the children of the marriage and maintenance. I will deal with those issues in that order.

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1. Divorce:

The petitioner, the wife, and the respondent, the husband are a married couple having been married on 5 January 1980. In the first quarter of 1993, the petitioner was under suspicion that her husband, the respondent, was having an affair with the co-respondent. The respondent was director of the Department of Lands and Environment until near the end of 1992. The co-respondent was a secretary in the same department. Due to her suspicions, the petitioner and her cousins kept watch of the respondent's whereabouts on the nights that the petitioner and the respondent were not together. Then one night in the beginning of April 1993, the petitioner asked the respondent to drop her off at her family at Savalalo. Not very long after the petitioner was dropped off, she headed back with her sister and cousins to their matrimonial home at Vaivase-uta. When they arrived at Vaivase-uta the lights downstairs of the matrimonial home were on but not the lights upstairs. The respondent came out of the house and asked the petitioner as to why she was there. The petitioner gave the excuse that she was there to look for a parcel. She searched every bedroom in the house and found the co-respondent in one of the bedrooms half-naked. She told the respondent this is the last time you will see me again in this house and then left. The petitioner's sister also testified that she saw the co-respondent half dressed inside the matrimonial home at Vaivase-uta on the same night.

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In his evidence, the respondent admits having committed adultery with the co-respondent. He says he has never denied to his wife, the petitioner, that he had committed adultery with the co-respondent. The co-respondent did not appear to give evidence. On these evidence, I find that the ground of adultery alleged in the petition has been established. Accordingly a decree is granted to dissolve the marriage of the petitioner to the respondent.

That brings me to the question of matrimonial properties.

2. Matrimonial Properties:

Facts:

The petitioner and the respondent were married on 5 January 1980. The petitioner at that time was a clerk and the respondent a qualified surveyor. They have three children of their marriage; the eldest, a boy, was born in 1981, the second child, a girl, was born in 1985 and the youngest, another boy, was born in 1987. It appears from the respondent's evidence that this marriage was a happy and harmonious one.

Before the respondent and the petitioner were married in 1980, the respondent had already acquired the half acre of land on which the matrimonial home is situated at Vaivase-uta. The land is registered under the respondent's name but he says that the land was purchased with savings by his mother and therefore belongs to

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his whole family including his parents, brothers and sisters. The only reason why the land was registered under his name was because at the time the land was purchased he was about to set up his firm of surveyors and he needed the land as security for a bank loan. All along it has been his intention to convey the land back to his parents as they are the real owners. Up to now the land has not been conveyed to the respondent's parents. There is no evidence from the petitioner to contradict or counter this part of the respondent's evidence. It is therefore clear to the Court that the land at Vaivase-uta on which the home is situated is a pre-marital acquisition by the respondent to which the petitioner made no contribution to the purchase price.

After they were married, the petitioner was employed in the surveying firm which had been set up by the respondent. She did secretarial type of work. She was paid a salary for her work by the surveying firm which was really controlled and run by her husband. The respondent's brothers also worked in the surveying firm and were paid salaries. In 1985 the matrimonial home at Vaivase-uta was built. The respondent says that 95% of that house was financed from the profits of the surveying firm and 5% from contributions by his brothers and sisters. The petitioner disputes this. She says that the house was financed entirely from the proceeds of the surveying firm. While I accept the evidence given by the respondent that his brothers assisted with the construction

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of the Vaivase-uta house in terms of labour, I take the view that the actual funding for the house came from the proceeds of the surveying firm.

Now the house when completed is a two storey building with eight bedrooms. The respondent says that the house was intended for him, his wife and children and for his brothers and sisters, as well as his parents to live in on their retirement as pastor and wife in the Methodist Church. During the marriage, the respondent and the petitioner lived in the master bedroom. The children lived in another room. The rest of the rooms were unoccupied. When the respondent's parents retired from the Methodist Church they moved into the house and lived together with the respondent and the petitioner in the house. However the respondent's mother did not get on with the petitioner, so the respondent's parents moved out of the house. Lesson for married couples, it is not always wise to put the mother in law and the wife under the same roof.

It is not clear how long the respondent's surveying firm existed, for it has now been closed for a number of years. During the marriage, the respondent also acquired an acre of land at Afiamalu. On 25 February 1993 he conveyed an undivided half interest in that land to the petitioner out of love and affection for her. After the petitioner moved out of the Vaivase-uta property in the beginning of April 1993, the respondent permitted

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the petitioner to use the whole one acre of their Afiamalu land as security for a loan of \$7,500 from the Bank of Western Samoa to assist in setting up a shop at the petitioner's family at Savalalo. She now lives at Savalalo. According to the respondent the value of the Afiamalu land must now be \$28,000. He is willing and prepared to give the whole of the Afiamalu land to the petitioner as her own. The respondent also acquired a Nissan pick up vehicle brand new in 1988 for \$38,000. Ownership of that vehicle has been given to the petitioner and she now has the use of that vehicle. The respondent says that the current value of the vehicle must be about \$30,000. The Court did ask counsel for both sides to submit valuations on the property at Vaivase-uta, the Afiamalu land and the Nissan pick up vehicle but up to now no such valuations have been received.

As the case unfolded during the hearing, it became clear that the principal claim by the petitioner is an interest in the Vaivase-uta house. This became the paramount issue in the case. No other properties were mentioned.

I come now to the law.

Law:

The difficulty in this area of Western Samoan law lies in its uncertainty. There is no legislative or judicial guidance so far,

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as to how to deal with matrimonial property disputes between married couples. No legal principles have been laid down on how to deal with such a situation. Both counsel in this case attempted to argue what the law is, or should be, in this important area of Western Samoan law. In other familiar common law jurisdictions, with the possible exception of Canada, the question of matrimonial property between married couples is now dealt with under legislation. In New Zealand the matter is dealt with under the detailed provisions of the Matrimonial Property Act 1976 which has replaced the Matrimonial Property Act 1963. In Australia the matter is dealt with under the Family Law Act 1975 (Cth). In England it is dealt with under the Matrimonial Proceedings and Property Act 1970 and the Matrimonial Causes Act 1973. While my research has confirmed that the New Zealand legislation is still in force, I have not been able to confirm whether the Australian and English legislations are still in force. So I can only assume that the aforesaid Australian and English legislations in this area are still in force. I cannot imagine a present day legislature enacting legislation to deal with such an important matter as matrimonial property subsequently repealing the legislation leaving the matter in limbo.

In Canada, matrimonial property disputes has been left mainly to the Courts to deal with : see Murdoch v Murdoch [1975] 1 SCR 423 and Rathwell v Rathwell [1978] 2 SCR 436. However in Pettikus v

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Becker [1980] 2 SCR 834 there is reference in the judgment delivered by Dickson J to the Family Law Reform Act 1978 of the province of Ontario. That legislation seems, from the reference to it, to be now dealing with matrimonial properties between married couples in the province of Ontario.

This brief survey shows that in other common law jurisdictions, with the possible exception of Canada, questions of matrimonial properties between married couples are now dealt with under legislations and not under common law principles. But even with Canada, matrimonial property disputes between married couples now appear to be dealt with by legislation in the province of Ontario. The difficulty with this situation for the purpose of this case is that it is now difficult to find any recent case law in other common law jurisdictions like New Zealand, Australia and England which apply common law principles to matrimonial property disputes between married couples. In fact I have been unable to find any such recent case law which will serve as authoritative guidance for the resolution of this case.

Be that as it may, the Courts, however, have been very creative in the recent past in the development of common law principles to deal with property disputes between unmarried couples or spouses to defacto unions. The common law principles which have been developed and applied by the Courts to defacto unions really

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have their origin in English authorities where the House of Lords dealt with matrimonial property disputes between married couples applying common law principles. I will now refer to these principles and how they have been developed and applied by the Courts in the common law world to matrimonial property disputes between unmarried couples or spouses to defacto unions. It will be seen that the Courts in the common law world have not been consistent in their approaches even though their different approaches would probably lead to the same practical results.

It is now generally accepted that in dealing with property disputes between unmarried couples the equitable device of constructive trust should be applied. Where judicial opinions differ is in the approach to be adopted in determining whether equity should intervene and impose a constructive trust in the circumstances of a particular case. The origin of the constructive trust device in this area of the law lies in Gissing v Gissing [1970] 2 All ER 780; [1971] AC 886 a decision of the House of Lords. In that case the married wife claimed a share in the matrimonial home which was purchased by her husband and conveyed into his sole name. The wife's claim was made on the basis that she had provided furniture and equipment for the house and had paid for improving the lawn. Her claim was rejected. In delivering his judgment in that case Lord Reid said :

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"If there has been no discussion and no agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house would not have been bought. I agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust".

Lord Diplock whose judgment in the same case has perhaps been referred to more often in subsequent decisions as the foundation for the application of the equitable device of constructive trust in this area of the law said :

"A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And it will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land".

Although some later decisions continue to speak in terms of resulting trust, see Falconer v Falconer [1970] 3 All ER 449 and Heseltine v Heseltine [1971] 1 All ER 952; the majority judgment in Murdock v Murdock [1975] 1 SCR 423 and Pettikus v Becker [1980]

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2 SCR 834 per Ritchie J, it is clear that the dominant phraseology now adopted by the Courts in the common law world is that of constructive trust; see for example Gillies v Keogh [1989] 2 NZLR 327 (CA); Baumgartner v Baumgartner [1987] 164 CLR 37 (HC); Sorochan v Sorochan [1986] 2 SCR 38 (SC) and Grant v Edwards [1986] 2 All ER 426 (CA). Referring to the constructive trust device in Avondale Printers v Haggie [1979] 2 NZLR 124, 147, Mahon J pointed out that in England the constructive trust device has been traditionally used as a substantive principle of liability which is imposed where a fiduciary relationship exists, whereas in America the constructive trust has been used as a procedural device to prevent unjust enrichment. It would appear to me from the case law on property disputes between married or unmarried couples, that the common law has come to the point where the constructive trust device is now broadly applied to achieve a just result in property disputes between spouses.

I come now to the various approaches or tests to determine the question whether a constructive trust should be imposed. These tests may be described as reasonable expectations, unconscionable conduct, unjust enrichment, estoppel and common intention. I will now refer in detail to each of these tests.

(a) Reasonable expectations:

The reasonable expectations test has been advocated and

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developed in New Zealand by Cooke P in a line of Court of Appeal decisions dealing with property disputes between unmarried couples. The first New Zealand case on this approach is that of Hayward v Giordani [1983] NZLR 140. In that case Cooke P at page 148 said :

"For the reasons outlined I would have been disposed to hold
"a constructive trust arose here, flowing from the joint
"efforts of the parties and reasonable expectations, even if
"they had not applied their minds to the precise question".

In the next case of Pasi v Kamana [1986] 1 NZLR 603, Cooke P at page 605 put the matter in this way :

"In conducting that inquiry I respectfully doubt whether
"there is any significant difference between the deemed,
"imputed or inferred common intention spoken of by Lord
"Reid and Lord Diplock (and now by the English Court of
"Appeal in Grant v Edwards) and the unjust enrichment
"concept used by the Supreme Court of Canada. Uncon-
"scionability, constructive or equitable fraud, Lord
"Dennings 'justice and good conscience' and 'in all fair-
"ness' : at bottom in this context these are probably
"different formulae for the same idea. As indicated in
"Hayward v Giordani, I think that we are all driving in
"the same direction. One way of putting the test is to ask
"whether a reasonable person in the shoes of the claimant
"would have understood that his or her efforts would natu-
"rally result in an interest in the property. If, but
"only if, the answer is yes, the Court should decide on an
"appropriate interest - not necessarily a half-by way of
"constructive trust, as indicated in Gissing v Gissing".

In the next case of Oliver v Bradley [1987] 1 NZLR 586, Cooke P at page 589 said :

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"Without repeating what I have ventured to say on the subject generally in Haywood v Giordani and Pasi v Kamana, I merely add that, with respect, the Judge's view appears to me convincing. The parties intended an equal sharing if the marriage eventuated but did not expressly address their minds to their rights if it did not. In that event, however, a reasonable person in the shoes of the plaintiff would undoubtedly have understood that his contribution and efforts would result in an interest in the property. Likewise a reasonable person in the shoes of the defendant would have had to acknowledge such a legitimate expectation - as indeed her counsel accepts. The share is not necessarily one half : it may be greater or less and should represent a fair apportionment of the contributions and efforts on both sides".

Then in Gillies v Keogh [1989] 2 NZLR 327, Cooke P stated that it normally makes no practical difference to the result whether one talks of constructive trust, unjust enrichment, imputed common intention or estoppel, as in deciding whether any of those tests is established the same factors are taken into account. His Honour then went on to say in page 333 :

"Whether one speaks in terms of reasonable expectations or unjust enrichment or any other objective test, it is plain that in grey area cases certain factors have to be weighed. The practical position now reached in defacto union cases by all the various routes appears to me to be that the Courts have regard to the reasonable expectations of persons in the shoes of the respective parties giving particular weight to the following factors".

These factors as mentioned by Cooke P may be summarised as the degree of sacrifice made by the claimant of an interest in the property; the value of the contributions made by the claimant compared to the value of any benefits received; and any property

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arrangements the parties may have made themselves.

It is to be remembered that the reasonable expectations test has been adopted in New Zealand to deal with property disputes between unmarried couples. It is arguable, in my view, that the same test can be applied to similar disputes between married couples where no legislation covers the point.

(b) Unconscionable conduct:

The test based on 'what is unconscionable conduct in the circumstances' has found favour with the High Court of Australia. In Muschinski v Dodds [1985] 160 CLR 583 a case dealing with a property dispute between an unmarried couple Deane J, in a judgment concurred in by Mason J, referred with approval to the principle of equity which prevents a person from asserting or exercising a legal right where to do so would constitute unconscionable conduct. His Honour then said at page 620 :

"....the principle operates in a case where the substratum
"of a joint relationship or endeavour is removed without
"attributable blame and where the benefit of money or other
"property contributed by one party on the basis and for the
"purpose of the relationship or endeavour would otherwise be
"enjoyed by the other party in circumstances in which it was
"not specifically intended or specifically provided that that
"other party should so enjoy it. The content of the principle
"is that, in such a case, equity will not permit that other
"party to assert or retain the benefit of the relevant
"property to the extent that it would be unconscionable for him
"so to do : cf Attwood v Mande and per Jessel MR Lyon v
"Tweddell".

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Deane J also pointed out that equity will impose a constructive trust, regardless of actual or presumed agreement or intention, to preclude the retention or assertion of beneficial ownership of property. Where to allow that to happen would be contrary to equitable principle.

In Baumgartner v Baumgartner [1987] 164 CLR 137 another property dispute case between parties to a defacto union that came before the High Court of Australia, the majority adopted and applied the unconscionable conduct test as the test for the intervention of equity and the imposition of a constructive trust. The passage cited above from the judgment of Deane J in Muschinaki v Dodds was quoted with approval in the majority judgment. I would quote a passage from that majority judgment as it reflects the unconscionable conduct test :

".... Mahoney J.A indicated some situations in which it might be appropriate to impose a constructive trust.
 "Thus he said : 'A husband may pay for the matrimonial home and cause the legal title to be vested in the wife. The wife may earn money and use it in defraying household expenses, thus relieving the family budget and allowing the husband to pay mortgage instalments on the home. It will be necessary, from time to time, to determine whether, in such situations, the failure to recognise that the one or the other has a proprietary interest in the home is so contrary to justice and good conscience that a trust or other equitable obligation should be imposed'.

"His Honour's reference to 'contrary to justice and good conscience' is to be understood as 'unconscionable'. The significance of this statement so understood is that it

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"asserts that the foundation for the imposition of a constructive trust in situations of the kind mentioned is that a refusal to recognise the existence of the equitable interest amounts to unconscionable conduct and that the trust is imposed as a remedy to circumvent that unconscionable conduct".

Given these decisions of the High Court, it is clear that the unconscionable conduct test now determines for the purpose of Australian law the intervention of equity and the imposition of a constructive trust in this area.

(c) Unjust enrichment:

The unjust enrichment test has been advocated in the Supreme Court of Canada and now prevails in Canada. It appears from the judgments of the Canadian Supreme Court that the unjust enrichment test applies not only to property disputes between parties to defacto unions but also to matrimonial property disputes between married couples.

The first decision of the Supreme Court of Canada where the unjust enrichment test appears to have been mentioned in this area of the law seems to have been Murdoch v Murdoch [1975] 1 SCR 423 which was a case on a matrimonial property dispute between a married couple. In his minority judgment in that case, Laskin J (as he then was) said at page 454 :

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"As is pointed out by Scott, Law of Trusts, 3rd ed. 1967, vol.5 at p.3215, 'a constructive trust is imposed where 'a person holding title to property is subject to an 'equitable duty to convey it to another on the ground 'that he would be unjustly enriched if he was permitted 'to retain it.... The basis of the constructive trust is 'the unjust enrichment which would result if the person 'having the property were permitted to retain it. 'Ordinarily, a constructive trust arises without regard 'to the intention of the person who transferred the 'property'; and again, at p.3413, quoting Judge Cardozo 'a constructive trust is the formula through which the 'conscience of equity finds expression. When property 'has been acquired in such circumstances that the holder 'of the legal title may not in good conscience retain the 'beneficial interest, equity converts him into a trustee'".

In the next case of Rathwell v Rathwell [1978] 2 SCR 436 which was another case of a matrimonial property dispute between a married couple, Dickson J in delivering the judgment of the majority adopted the unjust enrichment test having referred with approval to the passage already quoted from the minority judgment of Laskin J in Murdoch v Murdoch. Dickson J then went on to state in page 455 the essence of the unjust enrichment test by saying :

"The constructive trust, as so envisaged, comprehends the 'imposition of trust machinery by the Court in order to 'achieve a result consonant with good conscience. As a 'matter of principle, the Court will not allow any man 'unjustly to appropriate to himself the value earned by 'the labours of another. That principle is not defeated 'by the existence of a matrimonial relationship between 'the parties; but, for the principle to succeed, the facts 'must display an enrichment, a corresponding deprivation, 'and the absence of any juristic reason - such as a contract 'or disposition of law - for the enrichment. Thus, if the 'parties have agreed that the one holding legal title is to 'take beneficially an action in restitution cannot succeed".

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Following Rathwell v Rathwell came the decision in the case of Pettkus v Becker [1980] 2 SCR 834 which was concerned with a property dispute between an unmarried couple. Again Dickson J who delivered the majority judgment reaffirmed the unjust enrichment approach in this area of the law. At page 847 His Honour said :

"The principle of unjust enrichment lies at the heart of the constructive trust. 'Unjust enrichment' has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of Moses v Macferlan [1960], 2 Burr 1005 at p.1012, 97 ER 676, put the matter in these words : '....the gist of this kind of action is, that the defendant upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money'. It would be undesirable and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise... The great advantage of ancient principles of equity is their flexibility : the judiciary is thus able to shape these malleable principles so as to accomodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury... How then does one approach the question of unjust enrichment in matrimonial causes? In Rathwell I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist : an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the Courts for centuries, though, admittedly, not in the context of matrimonial property controversies".

In the next case of Sorochan v Sorochan [1986] 2 SCR 38 which was also concerned with a property dispute between an unmarried couple, Dickson CJ delivered the judgment of the Court reaffirming and applying the unjust enrichment approach. One further point of note

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from that case is that the Court not only allowed relief by way of a constructive trust to remedy the unjust enrichment found by the Court, but an additional straight-forward monetary award was also allowed. I also note from the judgment of Cooke P in Gillies v Keogh [1989] 2 NZLR 327, 332 that he has endorsed the approach of the Court of Appeal of Saskatchewan in Everson v Rich [1988] 53 DLR (4th) 470 for awarding monetary compensation in suitable cases of property disputes between spouses.

(d) Estopple:

The test, based on estopple to property disputes between spouses does seem to have some judicial support. In Gillies v Keogh, Richardson J does favour this approach. At page 344

His Honour said :

"The crucial question is in what circumstances, and on what principled basis in law, are the Courts entitled to find an equitable interest in property to exist where the parties did not have a common intention as to how beneficial interests in a family asset should be held? The first part of the question I would answer in this way. Has there been a direct or indirect contribution by the claimant in relation to the property in circumstances such that it should be inferred that the claimant would have understood that those efforts would naturally result in an interest in the property? If so, and this is the second part of the question, I would be inclined to answer in terms of the well settled principles of estopple which preclude the legal owner from denying the existence of an equitable interest in the property".

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See also the reference in Gillies v Keogh by Cooke P to the unreported decision of the English Court of Appeal in Stevens v Stevens [1989] which was a straight-forward application of the estoppel doctrine.

In the English Court of Appeal decision in Grant v Edwards [1986] 2 All ER 426, Sir Nicholas Browne Wilkinson VC in an obiter dictum not essential to his judgment in that case said at page 439 :

"... I suggest that the law of proprietary estoppel may again provide useful guidance. If proprietary estoppel is established, the Court gives effect to the common intention so far as may fairly be done between the parties. For that purpose, equity is displayed at its most flexible : see Crab v Aran DC [1975] 3 All ER 865, [1976] Ch 179. Identifiable contributions to the purchase of the house will of course be an important factor in many cases. But, in other cases, contributions by way of the labour or other unquantifiable actions of the claimant will also be relevant".

(e) Common intention:

The approach based on common intention has been derived from the speeches of Lord Reid and Lord Diplock in Pettit v Pettit [1969] 2 All ER 385; [1970] AC 777 and Gissing v Gissing [1970] 2 All ER 780; [1971] AC 886. Broadly speaking, this approach suggests that the Court has to try and ascertain the common intention of the parties to a marital relationship from their words or conduct. Direct and indirect contributions by a spouse to the

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matrimonial properties are a relevant consideration in the ascertainment of the common intention. After taking into account all relevant considerations the Court may decide to infer a common intention of the parties in order to do justice in a particular case. Without a common intention being inferred from the words or conduct of the parties, a claimant for beneficial interest in matrimonial property will not achieve such interest under the common intention approach. However it is also to be noted that the mere fact that a common intention has been established is not enough to give rise to a constructive trust under this test; the claimant to a beneficial interest against the legal owner must also establish that he or she has suffered a detriment : Grant v Edwards [1986] 2 All ER 426; Lloyds Bank v Rosset [1990] 1 All ER 1111 (HC).

This approach has been criticised, and except perhaps in England, it no longer appears to command general support elsewhere. Because of the difficulty in the ascertainment of the parties' actual or implied intention to matrimonial properties, since they rarely address their minds during the marriage to the question of who owns what asset and to what extent, the common intention approach has been criticised as artificial, for example, by Professor Waters in the [1975], 53 Can. Bar Rev. 366 : see the judgment of Dickson J in Pettkus v Becker. This approach has also been impliedly criticised by PS Atiyoch in The Rise and Fall of

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Freedom of Contract [1979] with particular reference to Pettit v Pettit and Gissing and Gissing : see the judgment of Cooke P in Pasi v Kamana.

It is to be noted that in Grant v Edwards [1986] 2 All ER 426 all three Lord Justices sitting in the English Court of Appeal in that case applied the common intention approach as an objective test. The judgment of Sir Nicholas Browne-Wilkinson VC provides a useful analysis of this approach. That judgment needs to be read in full for a better understanding of the common intention approach.

(f) Test to be applied:

Given the absence of legislation and judicial decision in this area of Western Samoan law, the question is which test or approach should be applied in this case. As a matter of personal preference, and without making a final commitment at this stage, I think the unjust enrichment and the reasonable expectations tests should be applied. One advantage of the unjust enrichment test is that it has been adopted and applied by the Supreme Court of Canada to property disputes between defacto partners as well as married couples. So there is clear-cut authority for the application of the unjust enrichment test to matrimonial property disputes between married couples. As for the reasonable expectations test, even though it has been developed in defacto union cases, it is arguable

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that it also applies to matrimonial property dispute between married couples where no legislation covers the point.

I do realise in applying the unjust enrichment test as one of the tests in this case, that for a very long time there has been debate whether the law of restitution and its controlling doctrine of unjust enrichment have an independent existence in English law. This is not the place for detailed reference judicial pronouncements on that debate. Suffice to point out that in England, Lord Wright in Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] 32 did recognise the doctrine of unjust enrichment and remedies in restitution as part of English common law. However Lord Porter in Reading v Attorney-General [1951] AC 507 and Lord Diplock in Orakpo v Manson Investments Ltd [1977] 3 All ER, rejected the existence of a general doctrine of unjust enrichment as part of English law.

Notwithstanding these judicial authorities against the existence of the doctrine of unjust enrichment as part of English law, there has been strong support for the adoption of the law of restitution and the doctrine of unjust enrichment into English law by Goff and Jones, The Law of Restitution, and by Birks, Introduction to the Law of Restitution. In Lipkin Gorman (a firm) v Karpuale Ltd [1992] 4 All ER 512 the House of Lords has finally recognised the independent existence of the law of restitution and the

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doctrine of unjust enrichment as part of English law.

In Australia the leading case on restitution and unjust enrichment has been the decision of the High Court in Fayer and Matthes v Paul [1987] 69 ALJ 577. In New Zealand, although the position has been unclear for some time, there are signs that New Zealand may also be moving towards the same position that England and Australia have now reached. In Van den Berg v Giles [1979] 2 NZLR 111, Jeffries J relied on the restitutionary principles of unjust enrichment in granting relief. However in Avondale Printers v Haggie [1979] 2 NZLR 124, Mahon J refused to recognise a general doctrine of unjust enrichment as part of New Zealand law. In Gillies v Keogh [1989] 2 NZLR 327, Cooke P made passing reference to the debatable position in New Zealand whether the law of restitution forms part of New Zealand law or not. His Honour then referred without disapproval to the unjust enrichment test applied by the Supreme Court of Canada to property disputes between married and defacto spouses.

So in all, it cannot be said that the application of the unjust enrichment test is no longer based on principle or authority. There are now, in addition to the Canadian authorities already referred to, authorities at the highest level in England and Australia giving recognition to the existence of the restitutionary principles of unjust enrichment as part of the

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common law of those countries.

For the sake of completeness, the approach to be applied under English law to a restitutionary claim is, firstly, has the defendant been enriched; if so, then secondly, has he been enriched at the plaintiff's expense; if so, then thirdly, is it unjust for the defendant to retain his enrichment; and fourthly, does the defendant have a defence to the claim. This is the approach to restitutionary claims proposed by Birks in his Introduction to the Law of Restitution. The last step of this approach now seems to be borne out in the speech of Lord Goff in Lipkin Gorman (a firm) v Karpuale [1992] 4 All ER 512 where His Lordship brought to life for the first time in English law the defence of "change of position" to restitutionary claims. This is a slightly different approach from the Canadian approach, based on unjust enrichment, to property disputes between spouses.

However as I have said, I am not prepared to make a final commitment at this stage of the evolution of the law in this area of matrimonial properties. After all, this case is the first where this Court has been confronted with a matrimonial property dispute. Secondly, the Court did not have the benefit of full argument on the issue. More consideration of the issue in another similar case is called for before a final choice is made. I would also reserve my position on whether the unjust enrichment test should be based

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on the Birks English approach or the Canadian approach. Be that as it may, I am in no doubt that the law of restitution now forms part of Western Samoan law.

(g) Fair and reasonable:

Before leaving this part of the case, I must deal with the submission by counsel for the petitioner that the Court should adopt a broad approach to matrimonial "property disputes based on what is "fair and reasonable in the circumstances". This submission is founded on the judgments of Lord Denning MR in Rimmer v Rimmer [1953] 1 QB 633; Fibrance v Fibrance [1957] 1 WLR 384; Appleton v Appleton [1965] 1 WLR 25; [1965] 1 All ER 44.

As counsel relied principally on Appleton v Appleton I will set out the relevant passage of Lord Denning MR's judgment in that case where he said :

"As the husband pointed out to us, when he was doing the work in the house, the matrimonial home, it was done for the sake of the family as a whole. None of them had any thought of separation at that time. There was no occasion for any bargain to be made as to what was to happen in case there was a separation, for it was a thing which no one contemplated at all.

"In these circumstances, it is not correct to look and see whether there was any bargain in the past, or any expressed intention. A judge can only do what is fair and reasonable in the circumstances. Sometimes this test has been put in the case : What term is to be implied? What would the parties have stipulated had they thought about it? That is one way of putting it. But, as they never think about it at all, I prefer to take the simple test : What is reason-

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"able and fair in the circumstances as they have developed,
"seeing that they are circumstances which no one contem-
"plated before?"

I think the attractiveness of this passage as well as nearly all other principles of law advocated by Lord Denning MR are their simplicity in wording, their appeal to reality, and their faithful adherence to the terminology of 'fairness', 'reasonableness' and 'justice'. For who wants unfairness? Who wants unreasonableness? Who wants an injustice?

Counsel for the petitioner does recognise that the approach advocated in Appleton v Appleton was rejected in Pettit v Pettit by the House of Lords. In Gillies v Keogh, Richardson J also rejected the use of fairness on the round as a test. In Baumgartner v Baumgartner the High Court of Australia refused to accept a broad approach based on "justice and good conscience". I think what the judges in these cases are saying is that they want a principled approach to achieve what is fair, reasonable and just. In fact if one refers to the analysis of the various judgments of Lord Denning MR in this area including Hussey v Palmer [1972] 3 All ER 744 a property dispute between a wife and mother-in-law, as made by Mahon J in Avondale Printers v Haggie [1979] 2 NZLR 124, it would appear that the "fair and just" or "fair and reasonable" approach used by Lord Denning MR was really for the purpose of doing justice by preventing unjust enrichment. Referring to the various

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judgments by Lord Denning MR in this area. Mahon J at page 148, although critical of the unjust enrichment principle, went on to say :

"What Lord Denning has done, if I may respectfully say so, is to evolve a principle of unjust enrichment and to use it as the appropriate doctrine when considerations of 'fairness' or 'unjust' are under consideration. That preference towards a general doctrine of unjust enrichment is observable in many of the dicta of the Master of the Rolls".

And then at page 149, Mahon J further pointed out :

"... the analysis of decisions such as Hussey v Palmer and Lord Denning's judgment in Binions v Evans and cases such as Cooke v Head [1972] 2 All ER 38; and Eves v Eves [1975] 3 All ER 768 clearly reveal the invocation of unjust enrichment as a principle of fairness applicable by reference to the assumed merits of each individual cases".

On the analysis by Mahon J, it is clear to me that the unjust enrichment approach can be used to achieve the goal of what is "fair and reasonable", or what is "fair and just", in the particular circumstances of a case, which is the goal or destination every system of justice in the common law world is aiming for. It appears to me that all the various tests referred to, have as their aim the doing of what is fair, reasonable and just. A test which does not meet those criteria, should not qualify as a test in a legal system aimed at doing justice.

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3. Application of law to facts:

Applying the unjust enrichment approach to the essential facts, the parties were married in 1980. The wife worked in the husband's surveying firm. It is not clear when she started working in that surveying firm and for how long. When the surveying firm closed down is also not clear. In 1985 the two storey and eight bedroom house at Vaivase-uta was built on land purchased before the marriage. That land is still registered under the husband's name. Obviously the wife made no contribution to the acquisition of that land. There is also no evidence that she made any contribution, direct or indirect, to the preservation, retention or improvement of the land. The house built on the land was built from the profits of the surveying firm owned and controlled by the husband as a qualified surveyor. Although the wife was employed in the surveying firm doing secretarial work, she was paid a salary. There is no evidence that she made any contribution, direct or indirect, to the building of the house, or its retention, or any subsequent improvement made to the house.

On this evidence, there was enrichment to the husband during the marriage in the sense that he had a new house built in 1985, and he also acquired an acre of land at Afiamalu and a brand new Nissan pick up vehicle in 1988. But for that enrichment there was no corresponding deprivation on the part of the wife. It cannot be said that in those circumstances, the husband has been unjustly

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enriched at the expense, whether financial or by physical labour, of the wife. There was some suggestion in the evidence about the wife contributing to the management of the household. However the evidence in this respect was somewhat sketchy and very unclear. In any event, it appears from the judgment of Cooke P in Gillies v Keogh that normal contributions to household expenses, maintenance, repairs or additions are not enough. More than that is commonly needed to justify an award of interest. As I have said, the extent of any household services rendered by the wife is not clear. There may be the uncommon cases where household services may sustain a claim. In this case it does not. I bear in mind that the onus is on the claimant to prove her claim. She has not proved the second element required for the unjust enrichment approach. There is therefore no need for me to consider the third element of this approach which is the absence of any juristic reason for the enrichment.

I will now turn to the reasonable expectations test. In applying this test, the first major factor to consider is the degree of sacrifice, if any, made by the claimant. This usually corresponds with any detriment to the claimant. I do not see in the evidence any sacrifice made by the wife to the acquisition of the Vaivase-uta land or construction of the house. There is also no suggestion from the evidence that she made any sacrifice for the preservation, retention or improvement of those properties.

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The second major factor to consider under the reasonable expectations approach is the value of any contributions made by the claimant compared to the value of any benefits she received. As I have said the wife did not, as the evidence shows, make any contributions, direct or indirect, to the acquisition of the land or construction of the house, or the preservation, retention, or improvement of those properties. She must have at times performed the normal duties of a housewife but the nature or extent of such services is far from clear. As for the benefits the wife has received, she lived on the land and in the house from 1985 to 1993. In 1993 her husband conveyed to her a half share of the land at Afiamalu which was at the time registered under the sole name of the husband. The husband has also allowed the wife to use the whole Afiamalu land as security for a loan. The estimated total value of the land according to the husband is \$28,000. He has also given the ownership and use of the Nissan pick up vehicle to the wife. The current value of that vehicle, according to the husband, is estimated to \$30,000.

In summary, the benefits received by the wife are, living on the land and in the house at Vaivase-uta from 1985 to 1993; half an acre of land at Afiamalu; and ownership and use of the pick up vehicle. However it appears from the evidence that both the Afiamalu land and the pick up vehicle were acquired by the husband without any contribution from the wife. There is no evidence of

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any contribution by the wife to those assets.

The third major factor to be considered under the reasonable expectations test is any property arrangements the parties have made themselves. In this connection, the half share in the Afiamalu land conveyed by the husband to the wife on 25 February 1993 before the wife left at the beginning of April would be a property arrangement between the parties. Likewise the ownership and use of the pick up vehicle given to the wife after they splitted up.

After considering all those factors, I am of the view that the wife has no reasonable expectation for having an interest in the house at Vaivase-uta which was the matrimonial home, or in the land on which the house is located. If anything, her expectation is unreasonable having regard to all the circumstances.

In view of the conclusions I have reached in the application of the unjust enrichment and reasonable expectations tests to this case, I have come to the decision that this is not a case for equity to intervene and impose a constructive trust giving the wife an interest in the matrimonial home at Vaivase-uta.

5. Custody:

As for the custody of the children of the marriage, their

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welfare is the paramount consideration. The petitioner wants sole custody while the respondent wants "joint custody". The children are now aged 13, 9 and 7 years and are staying with the petitioner, their mother, but they also go out with their father at times.

No doubt this is a difficult situation for the children as they both love their parents. They are old enough to know their parents and are used to their company. They must still look to the Vaivase-uta house as their home. The respondent now works as a programme officer with the United Nations Development Programme (UNDP) and the petitioner works at the store located at her family's place at Savalalo where she is living with the children. In the circumstances, bearing in mind the welfare of the children, I made the following orders which are to be reviewed at the end of three months :

- (a) the children are to stay and live with the petitioner;
- (b) the respondent is reserved the right of reasonable access to the children;
- (c) the children are to be allowed to visit the respondent and spend time with him when they wish to do so, but subject to the consent of the petitioner which shall not be unreasonably withheld.

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6. Maintenance:

The petitioner claims from the respondent \$1,500 per month for the general maintenance of herself and the three children. She also asks that she lives with the children in the Vaivase-uta house and for the respondent to move out and live elsewhere. The respondent is willing and agreeable to let the petitioner and the children live in the Vaivase-uta house and for him to live elsewhere so long as the homestead remains under his name.

Now the respondent earns a salary of \$23,618 per annum or \$880 per fortnight. He says he has no other income. The petitioner says the respondent has consultancy work in the pipeline from which he would earn additional income. The respondent also submitted a list of his weekly expenses but during the hearing he said that he no longer pays National Provident Fund contributions. His weekly expenses comprise of church donations \$80, electricity \$30, groceries \$60, Housing Corporation loan repayment \$75, telephone \$50 and transportation plus petrol \$50. His total weekly expenses is \$345. Out of his salary of \$880 per fortnight, the respondent says he can only afford to pay \$100 a week towards the maintenance of his wife and children.

I take into account in assessing maintenance that the petitioner is now about 35 years of age, appears physically healthy, and works at her family's store from where she must earn

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some remuneration. I also take into account that if the respondent moves out of the Vaivase-uta house, as he has agreed to do, so that the petitioner and the children will live in the house, it would mean he has to pay rent for alternative accommodation. That will be an additional expense for the respondent. The respondent also says that all that he lives for now are his children and is willing to pay additional maintenance when he has more income.

I have, therefore, decided to make these orders :

- (a) The respondent is to pay \$100 a week for the maintenance of the petitioner and the three children.
- (b) By consent the petitioner and the children are to occupy the Vaivase-uta house and the respondent is to move out and live elsewhere. Counsel to file submissions in writing within seven(7) days as to the terms and conditions of occupation by the petitioner and her children. These are to include such matters as conditions of stay, maintenance and repairs of the house, and so forth.

The parties are to submit memoranda on the question of costs within seven(7) days if they wish to do so.

T. F. M. S. J. A. L. N.
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CHIEF JUSTICE

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