MATRIMONIAL PROPERTY LEGISLATION—
"Its History, and a Critique of the Present New Zealand Law"

by

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I. Introduction

Modern matrimonial property systems have been transformed in two great periods of reform. The first was during the late nineteen and early twentieth centuries, and was part of the period of great social change that followed the Industrial Revolution. The second began in the post-war period, continues to occupy reformers today and is related to changes in the ideology of marriage and in economic and social roles of women, especially married women. It is the aim of this paper to trace the different ways different systems have developed and the important effect ideologies have had on the shape of that development. Particular attention is paid to the New Zealand position and the importance of ascertaining and clearly defining what current ideologies of marriage are in order to ensure the success of any legislation we may adopt.

II. The First Phase of Reform

The first phase has been analysed as characterized by two trends which appeared in many matrimonial property systems appearing at different times in different places and achieved by different techniques.[1] In all systems the husband had the power to manage the family property, including that of his wife, since the husband was traditionally regarded as master and guardian of his wife. By the late nineteenth

[1] M. Glendon, "Matrimonial Property: a comparative study of law and social change", (1974) 49 Tulane Law Review 21.

century there were moves to eliminate the husband's right to manage or dispose of his wife's assets, to give the wife the right to manage and dispose of some or all of her own property and earnings in the same way as her husband or a single woman could. Formal equality of the spouses was gradually taking root. The other trend, which has been emphasized to different degrees by different systems, was that of sharing based on the concept that marriage was a joint venture and that the real equality of the sexes required more than the formal freedom of married women to own and freely manage their assets.

Reform of property relations between the spouses in the Common Law world was more marked by the trend towards formal equality than the notion of sharing. In England the most significant reforms began in 1870 and culminated in 1882 with most of the disabilities of the married woman being removed. Formal equality was achieved by separation of assets by the Married Women's Property Acts, which meant that marriage had no effect on property rights. Before these reforms the wealthy had long been able to protect the property of wives by such devices as marriage settlements, the married woman's separate estate in equity and the doctrine of restraint on alienation. In practice this meant her property would revert to her kinsfolk in the absence of children. The Courts of Equity would compel the husband to settle property on his wife and children and they gave to the wife rights over her property, to sell, give away or leave it by will. A married woman could possess separate property over which the husband had no control.[2] It was this equitable concept of separate property which was borrowed by the Legislature in 1870 and 1882. The whole of a woman's property, however it came to her, was her separate property over which she had freedom to deal. Expensive formal settlements were inappropriate to the increasing numbers of ordinary people elevated from an existence of subsistence and filling the ranks of the middle class, and to the increasing numbers of women wage earners and professionals. This was the background to the efforts of one very influential and persuasive reformer, John Stuart Mill, who was ardently devoted to the principles of equal political and civil rights for man and woman, and to whom many attribute responsibilities for these changes.[3] The emphasis was on individualism. If men owned their property untrammelled by the claims of spouses then so should women. It was to be some time before the problem was seen in terms of giving the wife a right to share in her husband's assets. Participation in the other spouse's property was indirectly achieved by

[2] Sir J. Simon, "With all my Worldly Goods", Presidential Address to the Holdsworth Club, 1964.

[3] G. M. Glendon, "Is there a Future for Separate Property", (1974) 8 Fam. L.Q. 319.

the laws of succession and divorce. A woman had a right to be maintained on divorce if her husband was guilty of matrimonial misconduct and, should she survive her husband, she had a chance he might leave his property to her. It was not until 1938 in England that complete freedom of testation (dating from 1833) was tempered by the concern that a spouse make "reasonable provision" for the other.[4] There was nothing, however, to prevent the husband disposing of all his property before he died.

New Zealand law was, until the 1960s, very closely based on the English, and consequently showed similar emphasis in reforms toward formal equality or separation of property and not towards the concept of sharing. The first important piece of legislation in New Zealand was the Married Women's Property Act of 1884, which followed the English acts of 1870 and 1882. By 1884 all real and personal property belonging to the wife at the time of her marriage, or acquired by her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she was engaged separately from her husband was her own separate property. She therefore became a legal person of almost the same capacity as her husband. It did not remove every inequality (and nor did the English Acts), leaving untouched for example the rules as to restraint upon anticipation, though most of them were removed by the Law Reform Act in 1936. The 1884 act, in essence, treated husband and wife virtually as strangers for property purposes—it "looked at matrimonial property as his or hers, seldom and reluctantly as theirs".[5] Participation, as in England, was achieved indirectly through the laws of succession and divorce, except that New Zealand responded much earlier on to the need to make "reasonable provision" for a dependant spouse on the death of the breadwinner, when it passed the first Family Protection Act in 1908.

The Courts, as well as the Legislature, did not encourage the participation of a dependant spouse in the separate property of the other. Section 20 of the Married Women's Property Act of 1884 provided for disputes between spouses as to title or possession to be summarily decided and permitted the judge to make such order concerning the property in dispute as he thought fit. The discretion was capable of very broad application (as later developments in England have shown, e.g. *Hine* v. *Hine*[6]), if the Judiciary had felt so inclined, but it was very narrowly interpreted. Its purpose was simply one of convenience to allow disputes to be dealt with in a summary

[4] Inheritance (Family Provision) Act 1938 (U.K.).
[5] P. M. Bromley & P. R. H. Webb, *Family Law*, (Butterworths 1974) 766.
[6] [1962] 1 W.L.R. 1124.

manner and not to interfere with legal or equitable rights in property on the grounds of fairness or justice.[7]

Separation of property was the basis of the law in New Zealand until the 1960's and yet, in the early years of the century, formal equality probably meant nothing to the average propertyless woman, whose real needs were security in the matrimonial home and the right to participate in the proprietary benefits which the husband enjoyed through her economic self abnegation.[8] The problem, therefore, was perceived according to prevailing views about the status of women and the prevailing ideology of marriage. Men and women should have equal legal rights and marriage should not effect them.

The civil law systems have traditionally embodied the concept of sharing, in contrast with the common law systems. In France, for example, a community of moveables and acquests was introduced as the standard system by the Code Napoléon in 1804.[9] Under the system all immoveables owned by either spouse at the time of marriage remained the separate property of the owner spouse. The moveable property of the spouses, no matter when acquired, and all property, moveable or immoveable, acquired after marriage, except immoveable property acquired through gift or inheritance, became part of the community fund which was shared equally on dissolution of the marriage. The husband, however, was given complete power of possession, income, management and disposal. The wealthy, like the English upper classes, developed the "contrat de marriage" to secure extensive powers to women to deal with their own property well before the Legislature entered the field. When it did, it was the question of the autonomy and legal equality of the spouses that was of concern. The basic structure of the Code Napoléon remained until 1965, but important changes were made in the first half of the twentieth century. In 1907, for example, the wife was given powers of management over her "bien reservé", i.e. the acquests made through her own separate gainful activities, and further reforms up until the 1940's abolished the legal incapacities of the married woman.[10] The dormant sharing aspect probably took on a new significance as the power of the husband was diminished because, in practice, it improved the position of the economically dependant spouse by securing to *her* property rights, which was something it was never intended to do. (Originally it was to secure her property for her blood line.) The movement towards autonomy had been significant but in practice

[7] *Telford* v. *Telford* [1934] N.Z.L.R. 882.
[8] Sir J. Simon, *loc. cit.*, 14.
[9] H. R. Hahlo, "History of Matrimonial Property Law" [1973] Osgood Hall L. J., 455, 460.
[10] M. Glendon, "Matrimonial Property", *loc. cit.*, 36.

hardly far reaching because the community, and thus the husband, still had the right to enjoy the separate property of the wife and, consequently, the wife only had the absolute right to transfer the bare reversion of her separate estate.

The impetus of reform had, however, run full course by the 1930's, both in England and France. Both countries were amongst those attending an international conference in Paris to evaluate and criticize their national laws regulating property relations between husband and wife. Their conclusion was that "the national legislation is responding admirably to the needs and desires of the population and any modification of the statutory system would be difficult and unnecessary". England would have to wait for further developments in the sharing aspect, and France in the area of equality. New Zealand simply followed England (with the odd exception, such as Family Protection Legislation of 1908) and there appeared to be no enthusiasm for change.

Sweden provides a marked contrast to both the English and French models of reform, in that the politicians attempted to recognize both equality and sharing in its matrimonial property system. The basic concept behind the new code of 1920 was equality of the spouses, not just in the meaning of legal autonomy but also in the sense of marriage being a partnership of two equal and independent spouses who should have equal shares in all the combined property of both.[12] It was a very radical approach which recognized an economically dependent spouse should be entitled to a share in the capital assets of the other and not just the right to be maintained. To achieve both goals the code left spouses substantially free to deal with their own property and earnings as they wished but, upon termination (or application by either spouse) a balance sheet is drawn up and the property is in principle divided evenly. Each submits to certain restraints on their individual power to deal with their own property, in order that there be something left to divide. For example, if the property is diminished to the detriment of the other, a spouse can ask for a division plus compensation for losses incurred. Also the owner spouse of the matrimonial home cannot in any way dispose of or encumber the matrimonial home without consent of the other spouse, and any such transaction undertaken without consent is null and void if objected to within a certain period. Transfer of chattels in which the other spouse has an interest will, however, be valid against bona fide purchasers. The most effective guarantee against any prohibited transactions is the statutory obligation of the Registrar of Land Titles

[11] *Ibid.*, 21.
[12] A. Malström, in W. Friedmann, Ed. *Matrimonial Property Law*, (Carswell, 1955), p. 410.

to ascertain that consent is given whenever it is required by the law.[13] The Swedish system was, in a sense, a forecast of the problems the Common Law and Civil Law systems were about to attempt to deal with—that is, how to accommodate the goal of autonomy with that of partnership. The Swedish attempt shows that neither can be completely fulfilled and at the same time accommodate the other. Their system of restraints was seen as one way to strike a balance between both, to accommodate the different facets of equality.

III. The Second Phase of Reform

Reform efforts in the post-war period have been even more intense than those of the first period:

> "The passion for law reform which has gripped the Western World since the end of the second world war has left no branch of the law untouched. Yet in no area . . . have demands for radical reform been more insistent or met with such ready response as the law of husband and wife. It soon became clear in most systems that in order to be acceptable to enlightened public opinion a matrimonial property system must meet two requirements: It must not reduce the wife to a status in any way inferior to the husband's, but leave her with the independence she enjoyed before her marriage, and it must establish in some way or other an economic partnership between the spouses, with the aim, primarily, of giving non-working wives a share in the acquests of their husbands."[14]

The Swedish concept of equality with its concomitant of mutual independence and profit sharing was increasingly felt to be relevant to reformers in other systems. What could have been appropriate in John Stuart Mill's time was only being considered now because of a fundamental change in the ideology of modern industrialized society. The economic condition of women had also changed. During the war most married women were wage earners . . . and what, before 1939, had been something of an exception had become the usual situation in most families, at least during the early years of married life.[15] Women were not (and still are not) the economic equals of men but their employment was usually part of a co-operative effort to achieve a common goal which could not have been done with the husband's income alone. It increasingly made sense therefore that marriage be regarded as a pooling of lives, expectations and futures. In the Common Law world this meant greater emphasis of reform efforts on participation in assets, and in the Civil Law world emphasis was on increasing equality in terms of autonomy.

In England the last vestiges of the inequalities of the medieval order were swept away gradually, e.g. in 1949 the remnants of restraint upon anticipation were abolished; in 1962 the Law Reform Act no

[13] *Ibid.*, 414.
[14] H. R. Hahlo, *loc. cit.*, 456.
[15] P. M. Bromley & P. R. H. Webb, *op. cit.*, 768.

longer prevented one spouse suing the other in tort and in 1970 the wife's agency of necessity was seen as unnecessary since she could now contract on her own behalf, under s. 5A of the Matrimonial Proceedings Act 1970. "Thus it is true to say, in English law, husband and wife are no longer one, but emphatically two, separate as to property and economically independent, except of course as to duties of support."[16]

How, then, was this accommodated with the concept of participation in the assets of the other spouse? Progress has been piecemeal and hesitant. Legislative reforms have dealt better with some situations than others. It has been pointed out that much of the legislation that Parliament has passed to cope with the property problems of spouses is applicable only to divorce, annulment and separation. For instance, the Matrimonial Proceedings and Property Act 1970 gave statutory authority to vary established property rights but only on a decree of divorce, nullity or judicial separation. In the situation where the wife hesitates to take legal action, because she hopes for reconciliation, there is no clear answer to the problems she will face. For example can the husband, if he is sole title holder, deprive her and the children of the matrimonial home and contents by selling them and, if the marriage finally collapses, what share of the property will she have accumulated during marriage? The Matrimonial Homes Act 1967 was an attempt to answer the first problem. It gives the wife a right of occupation in the matrimonial home, which may belong to the husband entirely or to both by virtue of some, as yet, undefined contribution of the wife. It is not an absolute right and the Court may take into account conduct, needs, and all the individual circumstances. The most important aspect of it is that it gives the right to register notice of occupation which protects against third parties, but a wife must know of her legal rights and act quickly, for, in the absence of registration there is no protection against a bona fide purchaser. Also there is nothing to stop the husband mortgaging the house to finance his new way of life, and there is no prima facie right to the proceeds and no protection at all against the sale of furniture and other moveable property.

As to the question of ownership in the pre-divorce situation, the Legislature has provided no clear answers. The starting point is that ownership is determined by the ordinary rules of property law, i.e. legal interests or beneficial interests that will be upheld by the Courts of Equity. The Courts developed a trend towards the idea of family assets to which both could have substantial shares,[17] but this law reform effort was checked by the House of Lords in the famous case

[16] H. R. Hahlo, *loc. cit.*, 470.
[17] *Hine* v. *Hine* [1962] 1 W.L.R. 1124; *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63.

of *Pettit* v. *Pettit*,[18] and, in any case, it was exercised on an entirely discretionary basis and one still had to establish some financial contribution in order to get up to a half share. All that can be said now is that it depends on what the parties intended at the time the property was acquired, but it is difficult to determine whether they intended anything, and in the absence of that, if the claimant spouse can show a direct or indirect financial contribution, that may entitle her to a beneficial share proportionate to what she put in. One thing is clear, since *Pettit's* case a trust will not be inferred where the contribution has been minimal. As a result the dependent spouse who has little or no income will, in the pre-divorce situation, may find it very difficult to determine what arrangements she can make for the future, or even every day necessities.

In the divorce situation, if there is any property left, the wife still has no rights to property acquired in the husband's name during the marriage. She does have a right of support supplemented by the right to apply to the Court for property to be transferred or settled on her. Under the Matrimonial Property and Proceedings Act 1970, upon a decree of divorce, nullity or judicial separation, the Court may order one spouse to make financial provision for the other by way of transfer or settlement of property. It is interesting, however, that the Act has not been used as the Law Commission and Parliament had hoped, and the Courts generally continue to secure financial provision by unsecured maintenance.[19] However, if a redistribution of property is made under section 5, the Courts are to take account of contributions to the marriage, including housework. What may in some cases result in a sharing similar to community property regimes is marked by two essential differences. The rights are unknown till a divorce is decreed by the Court, and conduct is still a factor to be considered, in spite of a moving away from the fault concept in divorce as evidenced by the Matrimonial Causes Act 1973. A fundamental conflict of ideology may thwart efforts at recognizing the partnership facet of marriage. If the roles of spouses are different yet equal, their share in property should be a right, and not a reward for good behaviour. Since it is considered unrealistic to pinpoint events and label them "misconduct" when they really point to incompatibility of two individuals, it seems unjust to translate the concept of misconduct into the property area.

Upon death of a spouse the situation varies depending on whether the other has been disinherited or whether there is an intestacy. Disinherited spouses may be worse off than divorcees. Their only right is to claim maintenance out of their husbands' estate under the

[18] [1970] A.C. 777.
[19] The Law Commission, Report No. 25, "Financial Provision in Matrimonial Property Proceedings", (1969).

Family Provision Act 1966, and that is at the discretion of the Court. The rights of a surviving spouse on intestacy have been substantially improved by the Intestates Estates Act 1952, and the Family Provision Act 1966. If there are children the wife gets a prelegacy of $8,500, and if there are not, $30,000; she gets all the personal chattels and a life interest in half the residence if there are children or other specified relations, otherwise she gets everything. The provisions, therefore, are generous and, in effect, may function much as community property systems do, but the underlying policies are completely different. Whereas community property systems secure a share to the spouses in all situations and are based on the idea that marriage involves a pooling of human as well as other concerns of the couple, the English law of intestacy is set in the context of other laws, which reveal a more individualistic view of marriage. The intestacy law does award a substantial share to the surviving spouse, but not because the survivor is regarded as entitled to a share of the acquests. Rather, it does so because that arrangement is thought to reflect what most couples want to be done with their property at death. If a spouse does not want the surviving spouse to have a share he is free to deprive her of one, except to the extent of reasonable provision.[20]

The English system has, therefore, introduced sharing mechanisms in a number of ways, but it does not take a consistent pattern. Why, for instance should a disinherited spouse be less well treated than a surviving spouse on intestacy? A piecemeal approach to reform seems to have emphasized the conflict in different ways. The slowly emerging concept of two equal and free spouses who take out equal shares for their joint efforts, in the divorce situation is in conflict with pre-twentieth century notions of autonomy that a man should be able to freely dispose of his property. Reform movements are now under way and are searching for techniques to incorporate more directly and more consistently the idea of sharing. In 1969 a British M.P. introduced a Bill for the establishment of a unified system of marital property with some community features. This was withdrawn at the Government's representation that it would request the Law Commission, an independent body dedicated to law reform, to prepare family property legislation. In 1971 the commission published a working paper strongly in favour of some form of deferred community and fixed legal inheritance right.[21] Later the Law Commission published a report in which it retreated from the idea of community, but felt the remaining problems arising out of a separation of property system could be resolved by more limited ideas such as joint-ownership of the matri-

[20] Inheritance (Family Provision) Act, 1938 (U.K.).
[21] The Law Commission, Working Paper No. 42, "Family Property Law" (1971) paras. 278-307.

monial home.[22] While these ideas, in theory, do not positively embody the ideas of partnership and equality, they may arrive in practice at the same solution offered by community regimes.

In 1965 French property law was fundamentally reformed when the Code Napoléon was replaced with a new community of acquests, which makes the spouses equal in shares in all property except pre-marital assets, gifts and inheritances. It was the outcome of twenty years thought and discussion on the subject, which began with the establishment of the Commission for revision of the Code Civil in 1945. The problem that faced the Commission was how to equalize the powers of the spouses within a community regime in order to improve the deficiency of the first great reform. The law finally passed was a retreat from the original position taken by the Commission, which proposed the husband be deposed as head of the family. The husband remained head of the family and consequently manager of the community, since there were fears of deadlock between the spouses as to property decisions. The wife's participation in management was, however, increased. For example she has a veto power of important property transactions, she has separate management over her reserved portion of the community, and they both separately administer their own separate property. There was much discussion between the Commission and the French National Assembly about community regimes, deferred community and absolute equality or separation regimes, as to which could best fulfil the demand for equal management of the community. In 1963 the Government commissioned a public opinion poll as an aid to reform. The popular view was that marriage was a relatively equalitarian institution and the majority favoured some sort of community as an accommodation of equality and sharing. Finally, in 1970, the husband was deposed as the head of the family but he retained his position as head of the community because of the practical difficulties anticipated in joint administration. They can, however, agree on joint administration and, outside of management of the community, the wife has full legal capacity and no longer needs her husband's consent to carry on a trade or profession.[23]

The important question is how the wife's share of the community is protected against the mismanagement and abuse of the community, which will normally comprise the family home and furniture. If the husband leaves, in the pre-divorce situation, the wife has an established property right which need not await the outcome of a court hearing to be determined. It is protected by certain devices. Under article 215 of the new Code Civil either partner is forbidden to dispose of the

[22] The Law Commission, First Report No. 52 (1973).
[23] M. Glendon, "Matrimonial Property", *loc. cit.*, 37.

rights which assure the family home and furniture without the consent of the other. If the head of the family jeopardizes this the wife has a right to bring an action en nullité within one year. The court can further order the husband under articles 220-1 not to dispose of any other property. Further, if either fails to make reasonable contribution to the expenses of the other party there is an informal and expeditious procedure by which part of the other's earnings can be attached, which will ensure the husband's joint obligation to pay for the day-to-day expenses incurred by the wife. Finally, the wife can get an order to appoint her as manager of the community or she can sue for separation. The essential difference from the English system is that since the wife's share of the community is an established right, the French do not feel the same difficulty in over-riding property transactions designed to defeat the community. It is treacherous for third parties but, perhaps as a result, they are cautious in the transactions they enter into. This represents a fundamental difference in ideology from the English system. It is a question of priority in which the French underline the importance of the family as opposed to the importance of the individual.

In the event of a divorce all property is presumed to be acquests unless proved to be otherwise, and it will be divided jointly. Conduct is irrelevant, as are needs and resources of the spouses. If, however, a spouse is dependant and needs support she (or he) will be awarded up to one-third of the defendant's income, which is similar to the position in England. This is unavailable to the guilty spouse. Maintenance is regarded as a matrimonial obligation to be fulfilled only if the other has fulfilled his obligation to the community.

The French system, therefore, deals more positively with the situation of breakdown and divorce, and the wife will usually be better off and in a more secure position than her English counterpart with equivalent assets. However, she may or may not be at a disadvantage on the death of her husband. The wife will take half the common property after debts are paid, and the community will bear the expenses of her sustenance for a nine month period. In addition, if she is in need, she may be entitled to a right of support enforceable against the estate. If she is disinherited this is all she will take. If, however, her husband dies intestate she will, in addition to her share in the community, be entitled to the income from one fourth of the estate. If the husband leaves a will and leaves the maximum permitted by law to his wife, she will receive one-third of his estate in addition to her half of the community property.[24] The real problem is that this system takes no account of the size of the combined estate of the

[24] *Ibid.*, 70.

spouses. While the French wife is never reduced to the position of receiving bare maintenance, the estate may be so small that she may need to take all in order to match what this in fact gives her English counterpart. In large estates it probably matters little that the wife may get a bare half. It will be more beneficial than being entitled to claim maintenance under the Family Provision Act.

The French system appears, therefore, to have balanced the needs of equality and sharing, which, though not without problems, seems to satisfy the needs of the French people. There are no imminent moves for reform. It deals more adequately with the pre-divorce situation, for even the most liberal of judges in England, Lord Denning in the *Wachtel*[25] case only awarded the wife a third share in the matrimonial home in a marriage he saw as truly a joint venture. On the death situation it protects the one spouse more adequately from the whims of the other, but in practice this may not be as advantageous as taking one's chance in the English "gamble". The problem of management remains to be resolved.

IV. The New Zealand Position

Reforms in the matrimonial field in New Zealand were intense in the 1960's, but initially both the Legislature and the Courts were slow in the efforts to achieve participation by the dependant spouse in the other's assets. As to equality in the sense of legal capacity, the position was summed up in the Married Women's Property Act 1952. It stated that a woman is capable of dealing in property, rendering herself liable in contract and tort, and suing and being sued in the same way as a man. One last remaining but practically insignificant inequality is that those restraints upon anticipation existing before the 1952 Act still remain.[26] When "participation" reforms finally came, they were a direct result of the Courts' inability to develop the Married Women's Property Act in the same (though inadequate) way as the English Courts in their attempt to mitigate the strict application of the separation doctrine.[27] The Courts were not prepared to attack the sacrosanct rules of property ownership. The farthest they would go in the post-war situation of chronic housing shortage, in interpreting the discretion under section 19, was to make orders for possession.[28] In certain other limited situations of little assistance to the average wife, the courts were prepared to use principles of resulting trust or

[25] *Wachtel* v. *Wachtel* [1973] 2 W.L.R. 366.
[26] Bromley & Webb, *op. cit.*, 767.
[27] *Hine* v. *Hine*, supra.; *Rimmer* v. *Rimmer*, supra.; *Bendall* v. *McWhirter* [1952] 1 Q.B. 461.
[28] *Masters* v. *Masters* [1954] N.Z.L.R. 82; *Reeves* v. *Reeves* [1958] N.Z.L.R. 317.

advancement which depended on very clear evidence of financial contribution or intention to gift.[29]

The Legislature itself initially reflected the same approach as the courts; that ownership even in the 1950's was considered sacrosanct is evident by the legislation of 1951 and 1953,[30] which provided for the transfer of tenancies on divorce and separation, but on the recommendation of the Law Revision Committee did not apply to owner occupied houses which then, as now, represented over half the dwellings in New Zealand. One may point to the Joint Family Homes Act 1950 (now replaced by the Act of 1964) as reflecting a change in policy on the part of the Legislature, but its deliberate object of strengthening the family bond and recognizing the common interest of husband and wife in the matrimonial home was tempered by the traditional rules of ownership in that it depends on the outlook and voluntary act of the legal owner to settle it on both, and while the right of survivorship is very valuable where the marriage ends in death, it has no impact in the divorce situation. This ambivalence, which acknowledges that people live in community of property during marriage but ignores it afterwards, continues to be inherent in much of our legislation today.

A more liberal approach to policy is evident in the reforming efforts of the 1960's, when two important acts were passed at the same time; the Matrimonial Proceedings Act 1963, and the Matrimonial Property Act 1963. It was increasingly felt right and proper that in situations where the family assets were acquired and held in the name of the husband the wife's contribution should be recognized, and that the remedy of maintenance (which the wife not only had to prove she was entitled to but also had to collect) was not sufficient recognition of this contribution. The Hon. Mr Hanan, the then Minister of Justice, later said of the Matrimonial Property Act:

> "[It] will enable the court to look more broadly at the picture of the contribution the wife has made to the common good of the family whereby the husband was able to save money to pay off the house. The court will be able to look behind the legal niceties."[31]

The words of the President of the Probate Division of the High Court, Sir Jocelyn Simon, had greatly influenced him. The Hon. Mr Hanan quoted him in the House as saying:

> "In the generality of marriages the wife bears the children and minds the home. She thereby frees her husband for his economic activities. Since it is her performance of her function which enables the husband to perform his, she is in justice entitled to share in its fruits."[32]

[29] Bromley & Webb, *op. cit.*, 774-780.
[30] Destitute Persons' Amendment Act 1951, s. 3; Divorce and Matrimonial Causes Act 1953, s. 14.
[31] 358 N.Z. Parliamentary Debates 1968, 3393.
[32] *Ibid.*

That that policy was confused however, as to just how and to what extent the wife was to share is evident by the conflict in the two Acts. Original efforts were directed towards dealing more equitably with the matrimonial home, and resulted in the Matrimonial Proceedings Act. In order to cover the separation situation, for which legislation seemed sometime off, the more general and direct approach of the Matrimonial Property Act was passed. It covered all the property of the spouses and may have been the result of expediency rather than a fundamental belief in the wife's right to a share in all the property.[33] Not only was the scope of property different, but the manner in which contributions were to be measured conflicted in the two Acts. In the Matrimonial Proceedings Act the non-propertied spouse was to prove a "substantial" contribution and, in the Property Act it was to be measured by contribution "simpliciter". The idea of a share because of one's ordinary contribution to the marriage was immediately in tension with the principle that something more substantial than playing one's ordinary domestic role in a partnership must be proved, which was a step away from Sir Jocelyn Simon's idea of a joint enterprise in which both play different but equal roles which contribute to a total sum of benefits of which property was only one aspect. The Proceedings Act was simply an extension of the old separation of property system in which any claim by the non-owner was viewed as an attack on the rightful legal owner. One writer rightly asked whether the New Zealand system was designed as a palliative to give the non-contributing wife a better claim than she had under the Married Women's Property Act, or was it designed to give property rights which reflected contribution to the marriage as a whole?[34]

Subsequent amendments to the Property Act show it was probably the latter. For instance, in 1968 an amendment was made by section 6(1A) declaring quite explicitly that contributions which already included money, services, and prudent management need only be of a usual and not extraordinary character. Conduct was specifically made unimportant (section 6A) unless it related to the acquisition, extent or value of the property. Both point to a property right, but why was the distinction made in section 6 that ordinary contributions in relation to the matrimonial home "shall" be taken into account, but only "may" in relation to other assets, if the property right was to reflect contribution to the marriage as a whole? Conflict within the Act still, therefore, exists as to how far sharing in an egalitarian way (as in Continental systems) is to be taken. The policy was overall substantially clarified, but no attempt was made to amend the conflicting

[33] The Report of a Special Committee on Matrimonial Property, (1972), para. 13.
[34] J. Priestley, "Matrimonial Property Systems" [1972] N.Z.L.J. 244, 248.

policy behind the Proceedings Act. "Substantial contribution" remained the test and misconduct made relevant by the decision in *Pay* v. *Pay*[35] to the quantum of a share was not attacked. The conflict between the two Acts was intensified by an amendment in 1966. Not only was the Matrimonial Property Act to apply during the subsistence of the marriage and following death, but also to divorce. The result is that a person seeking divorce has the choice of whichever Act is to his advantage and, in some situations, the modern view of partnership and sharing may be defeated by basically more traditional concepts.

As interpreted by the courts, the legislation has achieved some success in recognizing the contribution and share of the propertyless wife in the assets of her husband. It cannot be regarded, however, as having successfully implemented the policy as stated by the Minister of Justice. Weaknesses that exist in the English system are still problems here. Here, as there, marriage does not of itself affect the ownership of property. Under the Matrimonial Property Act, section 5, a spouse has the right to apply to the court in any question between husband and wife as to title or possession or disposition of property. A question sufficient to found the court's jurisdiction to enter into the matter arises once a spouse puts forward a claim to an interest in the matrimonial property different from the one defined on the face of the title deed.[36] The spouse who is occupying the home and hopeful of reconciliation with her estranged partner could, therefore, apply to the court which, in its discretion, could grant possession and forbid the owner-spouse to transfer the property. However, this takes no account of the fact that a wife probably will have no idea of her legal remedy, and may hesitate and delay in seeking legal advice and taking legal action for fear of alienating the husband still further by "threatening" legal solutions. Further, a right to apply to the court under section 5 does not give rise to a legal or equitable interest, and the wife, therefore, has no right to caveat her as yet undefined share (which could amount to and include possession).[37] The person with legal title, therefore, may have ample opportunity to sell the property, and while the wife can assert her claim under section 5 against the proceeds, that will be little consolation where the husband has dissipated the assets without any equivalent asset being acquired.[38] Section 7(5) of the Matrimonial Property Act provides that where an application has been made under section 5, dispositions may be set aside under section 81 or restrained under section 80. They will not, however, be set aside against a bona fide purchaser for value, and a spouse must

[35] [1968] N.Z.L.R. 140.
[36] *Dryden* v. *Dryden* [1973] 1 N.Z.L.R. 440 (C.A.).
[37] *Chapman* v. *Chapman* (1973, Auckland M. 108/73).
[38] *E.* v. *E.* [1972] N.Z.L.R. 859 (C.A.).

act quickly to come within the provisions of section 80(1) which gives the Court power to forbid a disposition where it appears to the Court that a disposition is about to be made to defeat a claim under the Property Act. These provisions are probably of little practical use —most purchasers will be bona fide and the spouse wishing to sell property against the other's wishes will no doubt be very secretive.

The wife will also find it very difficult to ascertain what she owns of the assets to which she may or may not have financially contributed and to which there may or may not be documents of title. Any answer her solicitor can give her will be very uncertain. The normal legal and equitable rules will prevail until the court, under section 5(3), makes such order as appears just "notwithstanding that the legal or equitable interest 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 dispute". The order will be based on the Court's view of the contribution that has been made. Fundamental to the New Zealand system is that it is a discretionary one. The advantage may be greater justice in the individual case, but the disadvantage is that it leads to much insecurity in the pre-divorce situation where a wife owns nothing and is reluctant to go to court to get ownership established so she can make financial arrangements, nor will she be able adequately to predict her share. The Act lays down some guidelines as to how it should consider an application. For example section 6 says the court "shall", in the case of the matrimonial home, have regard to contribution and "may", in the case of other assets, but there is nothing limiting it to giving emphasis to any other factor in arriving at what Chief Justice Wild described as the court's ultimate duty—the duty to make such order that appears just.[39] Another aspect of the discretionary system is that it works against the non-propertied spouse who has the onus of proving contribution.[40] In the ensuing contest the wife, therefore, begins at a disadvantage. There is no presumption of joint-contribution, even to the matrimonial house. The husband, as titleholder, will have made a direct and unquestionable contribution of money to the property which speaks for itself, yet he may have been the more indolent and unco-operative spouse and, consequently, have contributed little to the community of the marriage as a relationship, as both Sir Jocelyn Simon and the Minister of Justice saw it.

The cases have revealed considerable and as yet unresolved conflict within the courts as to how the discretion should be applied. The Courts, depending on which judge decides a case, "see-saw" from a

[39] *Ibid.*
[40] *Ibid.*

liberal stand to a restrictive one, from treating the Matrimonial Property Act as a true matrimonial property statute to one designed to mitigate the "bleak and inflexible" rules of separate property law.[41] *Hofman* v. *Hofman*[42] is a convenient starting point. It represents what was originally a liberal stand on the part of the courts. Woodhouse J. was at pains to implement the policy of the Act. He said:

> "Clearly the intention is that legalistic assessments of the property rights of spouses must give way to the justice of the case and this I think goes well beyond giving a statutory blessing to the sort of attempts which have been made by the courts in England over the last few years to extend the discretion within the framework of existing principle."[43]

In his view, instead of solutions designed to "tip-toe" around the conventional rules, we were being given a statute that recognizes that marriage is a partnership of a very special nature in which the housewife, by playing her part, frees the husband to win the money income they both need for the furtherance of their joint enterprise:

> "At least it can be said with confidence that artificial adjustments founded merely on money contributions by the one spouse or the other can now be avoided and the women who have devoted themselves to their homes and families need not suddenly find themselves facing an economic frustration (at least in the area of family assets) which their husbands have usually been able to avoid."[44]

It was, therefore, a general contribution to the marriage that was to be considered in granting a share in all the family assets or all those things intended for, or to benefit their "joint enterprise". Woodhouse J. found on two grounds that this new policy entitled the wife to her half share.

First, the contribution had been equal to the husband's and, secondly, the facts showed a common intention to equally share their assets. The case was affirmed on appeal, but on the basis of common intention, and the important policy reasons were left open for further discussion.[45]

The *Hofman* approach was followed by some judges for several years but the "further discussion" in the Court of Appeal decision, *E.* v. *E.*[46] seriously restricted it, saying it was the result of unwarranted judicial legislation. At first instance Tompkins J., following the *Hofman* approach, had made an award to a wife based on the concept of community of surplus which means a sharing of those assets acquired during the marriage. The wife made a claim for such portion of the husband's assets as the court should think fit. In other words it was a claim to his assets in general, including his business, and based

[41] *Hofman* v. *Hofman* [1965] N.Z.L.R. 795, 798, per Woodhouse J.
[42] *Ibid.*, 795.
[43] *Ibid.*, 800.
[44] *Ibid.*, 801.
[45] [1967] N.Z.L.R. 9, p. 17.
[46] [1972] N.Z.L.R. 859, 895, per Turner J.

on the contribution made by her in assisting in one of his businesses in the early stages of their marriage and in redecorating some of the house properties the husband had been buying and selling, in addition to her normal wifely duties. The judge found that the wife had not only carried out her normal housewifely responsibilities for twenty-one years, but also services far beyond the usual services of a housewife. He awarded her $13,750, which was a quarter of all the property acquired during the marriage. The Court of Appeal, however, decided there was no concept of family assets, nor any idea of a general contribution. Under section 5(1) and section 6, one must prove a contribution and that it was related to a specific, identifiable asset. In the circumstances North P. recognized that her contributions, both ordinary domestic ones and her efforts in redecorating, were substantial, and coupled with her valuable right of survivorship in what had been a joint family home, they entitled her to a half share of the house. In money terms this was substantially less than the quarter she had previously been awarded and, in reality, she got nothing in the hand at all since possession was vested in the husband till the court should order otherwise. As to the business assets, the husband maintains his "valuable advantage . . . because the extent of the interest which each might have in the property in dispute (is still) consistently . . . tested by the money contributions",[47] for, in the absence of financial contribution, the wife must show that the business has been carried on jointly before a claim will even be entertained. One wonders at the justice of the case when a wife who has performed her part for twenty-one years gets effectively only her maintenance with which to start life anew, while the husband retains total assets of over $70,000. Sharing, based on the Continental concepts, was disallowed a place in our property law, which was treated simply as intended to give the non-propertied spouse a slightly increased opportunity to establish a claim.

It can be argued that this outcome was the result of the plain words of the statute. Turner J. said the plain words do no more than allow the court to make such order as may appear just with respect to the "property in dispute", and that the New Zealand provisions could not be construed as approving the concept of community of surplus.[48] Woodhouse J. did not have the same difficulty and nor did the Chief Justice in his dissenting judgment in *E.* v. *E.* He said that:

> "No such restrictive language appears in this section. Unhappily matrimonial disputes about matrimonial property are not confined to the particular. . . . The Legislature has recognized this and provided for the general in the wide language used in Section 5, . . . and it would be a

[47] *Hofman* v. *Hofman*, supra. 798.
[48] *E.* v. *E.*, supra. 895.

> well nigh impossible task . . . to examine each item of property in dispute in turn and decide upon the respective contributions to it. How, for example, would one evaluate the wife's contribution to the family car, or the husband's to the sewing machine."[49]

The judge was in danger of losing "sight of the wood for the trees" and being unconsciously directed from his ultimate duty which is to make such order as is just. This absurdity was almost acknowledged by the majority in a later case where it was said that a benevolent view would be taken in relation to the matrimonial home, because it is so difficult to assess the effect indirect contributions have had on the value of a specific asset.[50] Those who take the narrow approach seem to acknowledge an obligation to allow the wife a genuine opportunity to claim a share in the matrimonial home, if not in anything else.

If the conflict between the two schools of thought had ended here there would at least have been a greater deal of certainty in the law, if not "policy". Unfortunately for certainty, but fortunately for "justice" some judges are reluctant to adopt the restrictive approach, and are attempting to achieve a return to the policy of the Act, but what one judge might award, others may strike down, depending on the composition of the Court of Appeal. While the Court of Appeal's decisions are binding on the lower courts, its findings have been interpreted as broadly as possible. In the recent case of *Aitkin* v. *Aitken*,[51] Woodhouse J. found for the wife a contribution, based directly on important savings which would have been impossible without her very careful attention to detail and, indirectly, by her competent domestic organization. This contribution had freed her husband to earn the income that was required for the double purposes of their family life and their investments, and could be related to individual assets, one being the matrimonial house in which she was awarded a half share, and the other a holiday home, the share awarded being $5,000. In an estate worth over $120,000 the wife's share was about $30,000. The Court of Appeal accepted the contention that a domestic contribution, at least of an extraordinary kind, could, in some circumstances, influence the value of property other than the matrimonial home, but they disagreed with the value that Woodhouse J. had put on it. A half share in the matrimonial home was ample consideration, and to award a share in the holiday home was simply a duplication of her interest. The indications are, therefore, that the domestic contribution would have to be of a "supernatural" kind to allow a share in assets other than the matrimonial home. The holiday bach was treated as the husband's investment and outside of the interests of his marriage.

[49] *Ibid.*, 864.
[50] *Haldane* v. *Haldane* [1975] 1 N.Z.L.R. 672 (C.A.), 673.
[51] Unreported, Wellington, 30 November 1973, C.A. No. 28/73.

An even more recent case has highlighted this conflict in the courts as to the degree of participation that should be allowed the wife. McCarthy P. perhaps showed signs of irritation when he said:

> "The views of majority must be accepted as being definitive of certain aspects of the application of the Matrimonial Property Act, however they may conflict with any particular view of what should be recognized as the social rights of wives in these days. . . . It has appeared to me that there still exists some uncertainty in the minds of some judges."[52]

The property in question was that part of a "gifted" property, comprising a farm with a matrimonial home on it, that remained to the husband. Wild C. J. (Supreme Court), and Woodhouse J. (dissent in the Court of Appeal) considered it was artificial not to regard the property as one family unit, but whether one regarded all the property as matrimonial, or only partly matrimonial and partly business, there was no reason why a domestic contribution could not be recognized in relation to any sort of property where it has had an impact on it. It may be easier to recognize the impact this sort of contribution has on the matrimonial home but this was because of the tendency to equalize the home as an institution with the house as a capital asset. In the particular case it was wrong to regard the property as a gift because of the considerable mortgages to which it had been subject when the husband received it, and regard had to be had to the influence on the accretion and diminution of the property as well as that on the acquisition. The husband was a bad manager and would have had to encumber his property considerably more than he did if he had had to pay a housekeeper. On the other hand the majority drew a clear distinction between the business farm and the matrimonial home, the latter being defined as the dwelling house and its immediate grounds. In the absence of joint management or financial contribution, it was well settled that a merely domestic contribution, even if it did release the husband to acquire assets, was insufficient to establish a claim to a business asset. The home was difficult because it was a gift, but since her long service probably helped her husband to retain the property, the wife was awarded $5,000 of its value, estimated at $21,000. In all, the husband's assets amounted to almost $119,000. This kind of justice, arising out of a statute to deal equitably with the individual situation clearly does not indicate partnership. It appears more like a compensation payment to a "dismissed domestic servant".

The same problems of uncertainty and policy conflict apply in the divorce situation, but they are perhaps exaggerated by the fact the Matrimonial Proceedings Act 1963 also applies to orders for possession or transfer of a share in ownership.[53] Under this Act the non-propertied

[52] *Haldane* v. *Haldane* supra. 673.
[53] Matrimonial Proceedings Act 1963, Pt. VIII, ss. 58, 59.

spouse will find it an even harder job to establish a claim since the contribution must be "substantial" and not merely domestic, and if she has been "guilty" of matrimonial misconduct that may be greatly to her disadvantage.[54]

The situation on the death of the breadwinning spouse is very similar to that in England. Intestacy provisions under the Administration of Wills Act 1969 are substantial and work similarly and sometimes even better than a community regime. The surviving spouse takes all the personal chattels and the first $12,000, and between one-third and all the rest, depending on whether or not there are issue or parents. Like the English system, it reflects the idea of what the individual spouse would want done with his or her property. If a wife is disinherited she is not protected by any fixed right, but has a claim for reasonable maintenance should the court think fit under the Family Protection Act 1968. Originally when it was passed in 1908, it was a great advance, but bare maintenance seems an inadequate recognition of life-long partnerships these days. It is possible for a dissatisfied spouse to apply for an order of the court under section 5 of the Matrimonial Property Act,[55] but it is doubtful that it was intended to apply to the surviving spouse of a harmonious marriage,[56] and it is undesirable that a spouse should have to go to court to prove that what the testator saw fit to provide was not a just apportionment of her contribution, and in any event the cases above show the award may not be very substantial. One would expect a society which presumably views marriage as an important institution but divorce with reluctant acceptance, would enforce recognition of the widow's joint role, even if not the divorcee's.

In conclusion on the New Zealand system, one can say there is no consistent approach and the policy conflicts between the Matrimonial Property Act and Matrimonial Proceedings Act should be clarified. The cases have increased the uncertainty as to what is the correct approach under the Matrimonial Property Act. The judges appear to be fairly evenly decided in their belief or disbelief of the partnership principle and it may just be time before the right combination will result in a Court of Appeal majority in favour of partnership principles and sharing on the continental basis. It must also, on occasions, depend on whether a case goes on appeal or not, whether a share remains determined on the basis of partnership or is struck down. In turn this uncertainty must surely affect the way solicitors exercise their discretion in arriving at an agreement. The Matrimonial Property Act has not been successful in implementing the policy

[54] *Pay* v. *Pay* [1968] N.Z.L.R. 140 (C.A.).
[55] *Wacher* v. *Guardian Trust* [1969] N.Z.L.R. 283.
[56] Priestley, *loc. cit.*, 248.

behind it. This may partly be the result of the "plain" words, but it also clearly relates to the different attitudes of the judges. With respect, it appears that the Legislature may have been unrealistic in its expectations of judges schooled in the "sacrosanct" rules of ordinary property law, and to more closely define the discretion might be to lose some of its desirable flexibility to arrive at just settlements in individual cases.

In so far as agreement seems to have been reached, as regards the relationship of the matrimonial home and the purely domestic contribution, it has still not resulted in the kind of award one would expect from a true partnership. In *E.* v. *E.* and *Aitkin* v. *Aitkin* the half share was a result of "extraordinary" domestic contribution, or a "common intention" of joint enterprise. Similarly, a study of unreported cases has indicated that awards only go up to as much as a half share when "common intention" can be found.[57] Indeed, in a recent case, a quarter share of the matrimonial home for many years of the usual domestic duties was considered a generous and substantial share.[58]

IV. Reform and Important Factors to be Considered

Clearly, therefore, the decision has to be made as to whether and what extent the partnership principle is to apply in New Zealand, and whether it is to apply during and after marriage both on divorce and death. If it is to apply then the provision must be made to preserve the wife's share from dissipation by the husband, whether we retain the discretionary system or adopt a community regime, and from inter vivos dispositions in the death situation. By creating an established and fixed right you are perhaps more likely to prevent wrongful dispositions in the first place, which is more desirable than "calling back" property since third parties will be affected, and trying to enforce debts for which there may be no remaining property to attach.

There have been many advocates of reform expressing different views as to the extent and techniques to be used.[59] In 1972 a Special Committee on Matrimonial Property comprised of members of the profession nominated by the Law Society and officials of the Department of Justice issued a report on the matrimonial situation in New Zealand. They recommended the enactment of a single, clear statutory code governing matrimonial property relations. They thought "contri-

[57] W. M. Mansell, "Whither Matrimonial Property" (1974) 4 N.Z.L.R. 271.
[58] *Haycock* v. *Haycock* [1974] N.Z.L.R. 409 (C.A.).
[59] J. Priestley, supra.; S. C. Ennor, "Matrimonial Property Act, 1963—a new deal", [1972] N.Z.L.J. 500.

bution" as defined by the 1968 amendment to the Matrimonial Property Act a valid test but that it should relate to all the assets acquired during or in contemplation of marriage, other than by gift or inheritance. A system of registration similar to the caveat system was envisaged as a way to protect a potential interest in any assets that might be the subject of registration.[60] The system would approximate a discretionary community of acquests and "global" orders could be made.

The underlying basis of the suggested reforms, or the ideology behind them was the Committee's view of what contemporary marriage is. As they see it it is a partnership to which each contributes according to his or her capacity and in which each are interdependent. This, they said, is to "express the reality of most New Zealand families today, and we suggest this concept should be at the heart of any matrimonial property legislation in this country".[61] The consensus of world opinion, with which they agreed, is that the spouses are joint as to possession, should be equal as to rights in respect of those assets, and separate as to administration. These statements give rise to two main questions which must be asked before further reform. First, they assume an image and model of a type of marriage in which a wife is exclusively occupied with household activities and the husband the breadwinner. It may be asked whether this is still appropriate since we are living in an era of great social and legal change in relation to family norms and laws? Secondly, the very systems (i.e. Sweden and Germany) that have influenced reformers everywhere are undergoing a fundamental change in their approach to balancing the needs of sharing and equality, which may indicate that their systems belong to the past.[62]

It is clear that the phenomenon of women devoted solely to domestic roles and, consequently, completely economically dependant, is on the decline. In 1966 the census showed only 19.9% of married women were involved in the labour force, and by 1971 this had increased to 26.1% "with every indication that this momentum of increase is being sustained".[63] We are still a long way off the situation of other countries, e.g. in U.S.A. in 1972 50.5% of all married women were in the labour force, but probably here as in America, very many more have worked or will work at some stage during their married lives.[64] The fact that the percentage drops on the 25-29 age group and rises

[60] The Report of a Special Committee on Matrimonial Property, (1972), para. 13.
[61] *Ibid.*, paras. 19-21.
[62] M. Glendon, "Is There a Future for Separate Property?" (1974) 8 Fam. L.Q. 319.
[63] *N.Z. Official Year Book*, 1974, 892.
[64] M. Glendon, "Separate Property", *loc. cit.*, 319.

to its highest level of 35.9% in the 45-49 age group is evidence of this. The fact remains, however, that employment is intermittent, and the information on occupation shows women are substantially employed in lower paying jobs.[65] Most women's work outside will be in addition to their work at home, and will be to achieve some family goal. In our society, in economic terms, it still therefore makes sense to view marriage as a pooling of lives, expectations and futures, and current reform efforts to give greater effect to sharing are therefore appropriate.

Given that the economic condition of women points to the need for joint ownership of assets, this will not necessarily result in a system that seeks to give effect to this.[66] A fundamental determinant of policy is the ideology that prevails at the time when reform is made. For instance, when the Married Women's Property Acts were introduced in England, they were intended to give effect to the idea of legal equality of everyone whether man or woman; they were the result of the ideology of a small and influential group and did little to recognize the economic reality of most women. John Stuart Mill, the leader of this group also saw marriage as a partnership but of two completely separate individuals,[67] which meant separate and equal as to property. Gradually, as the partnership concept was developed, the "eternal tension" between the separate autonomous existence of individuals and the community of life that associates them was sharpened in an attempt to strike a balance. In Sweden and Germany the scales are again being adjusted, this time to give greater weight to the individual happiness and personal fulfilment of the spouses, since the current ideology is that the marriage should last only so long as it performs this function to each individual's satisfaction. Individuality has long been inherent in Swedish law. Since 1915 the opening words of the Swedish marriage ceremony have stated, "The end of the marriage is the welfare of individuals who desire to enter matrimony,"[68] but it is now being given much greater emphasis and this is reflected in the Matrimonial Property Law as the reform movement heads back to a system of separation, in spite of the fact that women are still not the economic equals of men. Compulsory sharing and restraints are seen as undesirable infringements on individual liberty, and as part of Swedish socialist philosophy it was seen that if the individual was to be liberated, it was the State's duty to provide the security. This is reflected in the assumption by the State of alimony responsibilities, and the prevalence of insurance schemes to cover loss of financial support whether by death or divorce.[69] The problem of economic security

[65] *N.Z. Official Year Book*, 1974, 892.
[66] M. Glendon, "Separate Property", *loc. cit.*, 323.
[67] Idem.
[68] Idem.

therefore does not need to be relevant to the assets of the marriage.

There are indications of this ideology of marriage lasting only as long as it fulfils individual happiness in New Zealand. We have long recognized (in the Matrimonial Proceedings Act, section 21(1)(n) and (o)) divorce by consent after two years apart, and unilateral divorce after four years apart. There are indications that we may be moving to unilateral divorce after a short period to allow for reflection, but it is doubtful that our particular brand of individualism will outweigh the desire that it should balance with the partnership concept. What the Swedish model may indicate is that given a situation of economic equality, plus an ideology of marriage as a temporary thing, plus expansion of social insurance, separation will be the system opted for. Given the economic situation of women in New Zealand the positive encouragement of marriage as an institution as opposed to Swedish neutrality, which is likely to continue amongst the majority of the population for some time, it is probably still appropriate to try and strike a balance between the conflicting goals of equality and sharing. It may be that ideologies are so clear in New Zealand that it is facile to demand enquiry but, as the divorce laws themselves show, with the combination of divorce by consent and divorce on the traditional fault principles, there is no one ideology of marriage any more and one can no longer say that there will be one set of social norms that all ordinary people hold. Reform efforts in New Zealand would, therefore, greatly benefit from the information from public opinion polls similar to those carried out in England and France as aids to reform, to determine how people regard the ownership of their property and their understanding of the present law and its appropriateness. Because of the pluralities of ideologies any new system should also provide ample opportunity to contract out.

If sharing is the proper approach in New Zealand, and I submit it is, then the decision must be made how it is to be achieved. The Special Committee thought the question of form, whether a discretionary system containing a number of sharing mechanisms, or a completely new community system was a question of social policy for the Legislature to determine.[70] Where the French public have demonstrated they favour communal ownership throughout the marriage, deferred community may be favoured by people here. The Special Committee suggested one possibility was a presumption of equal contribution to some assets and, in particular, the matrimonial home.[71] The English Law Commission suggested ownership of the matrimonial home and

[69] J. W. F. Sundberg, "Recent Changes in Swedish Family Law: Experiment Repeated" (1975) 23 Am. J. Comp. L. 34.
[70] The Report of a Special Committee, *loc. cit.*, para. 24.
[71] *Ibid.*, para. 25.

joint use and enjoyment of its contents.[72] Whether we choose a discretionary system or a community system, one eminent writer has suggested, the same objects can ultimately be achieved.[73] Each system appears to be gradually answering the problems that have been resulting in criticism. A common criticism of the community regimes was the inequality in management and the supremacy awarded to the husband. In California, to avoid the unconstitutionality of this arrangement, the Legislature introduced equal rights of administration. It is suggested that this might lead to a great deal of interspousal litigation[74] to prevent one spouse abusing the property of the other, but if the argument, which has continually been used to support separation of administration during marriage, holds good, that spouses live in a "defacto community" as to administration and possession of assets during marriage, there is no reason why the courts should not substantially withdraw from interspousal disputes during a working marriage, just as they do in separation systems.

New Zealand, within its discretionary system, superimposed over a separation regime, may also answer some of the problems in its system. For example by introducing a "caveat" system, a wife's interest, at least in the home, will be protected against an estranged and irresponsible husband.

There are, however, other important factors that should influence the sort of system we have. First, the principle of partnership in relation to assets should be implemented in a way appropriate to a partnership and not just paid lip-service. This means a half share, as opposed to an undefined share of the assets acquired during the marriage. Simplicity and certainty are other important factors in an area of the law dealing with personal relationships. People should not be led into marriage under the misapprehension that they are sharing all their "worldly goods" only to discover later that their share is minimal. In the absence of an inventory at the beginning of marriage of those assets to be excluded (which would provide those with substantial assets ample opportunity to exclude them if they so wished), all assets should be the assets of the marriage. The retention of the discretionary system is seen as important by some, since it can be argued that it leads to greater justice in the individual case. If it is to be retained, it is submitted that there should at least be a presumption of equal shares in order that neither spouse starts off with an advantage in the ensuing "contest". The main problem with a discretionary system is that it places the spouses in a situation of conflict, each

[72] The Law Commission, First Report, No. 52.
[73] O. Kahn-Freund, "Report of Committee", (1972) 35 M.L.R. 403.
[74] K. W. Belan, "California's New Community Property Law—Its effect on Intersponsal Mismanagement Litigation", (1975) 4 Pac. L.J. 723.

trying to prove his claim, and is, therefore, conducive to feelings of bitterness in the marriage breakdown situation. The law, in other aspects, is tending to move away from the contest procedure because it is increasingly recognized that it simply increases bitterness and threatens the good relations of spouses in the post divorce situation, when the ability to communicate on reasonably amiable terms is vital, not only to accepting an upheaval in one's life, but more especially to dealing with any children of the marriage. It would be a pity to shift the "contest" out of the question of divorce itself into the property area.

One can imagine the allegations and accusations that both parties would invent to prove they had been careful, thrifty and good managers while the other had been an extravagent spendthrift. Further, its success in social terms, as the New Zealand experience shows, depends very largely on the attitudes of the judges. Perhaps when judges are especially selected and trained to deal with this work of such a highly personal nature, the discretionary system would be more acceptable. At present it rarely seems to do "justice" in the individual case.

Property and maintenance are issues which are very closely related. Traditionally a woman's right was to maintenance. More appropriate to the modern ideology of partnership would be equal division of property as recognition of a right, and the retention of maintenance to provide for economic security where there is a need. In a society where divorce is not uncommon, the economic independence of a spouse should be encouraged, but only in such cases where it would not amount to the punishment of a spouse who has been encouraged to give up economic skills for marriage. On the other hand, however, our society does acknowledge the high possibility of a breadwinner re-marrying and, from a practical point of view, it may be impossible for him to be obliged to adequately provide for two families.[75] Study shows many wives find it demoralizing to be kept by a man they dislike, and many husbands resent paying out for something from which they get no return and go to extraordinary lengths to avoid paying out.[76] Also, many women might lead happier and fuller lives seeking employment than brooding at home over their wrongs. Maintenance, on principle, should therefore be a short term thing and perhaps for that period which is necessary to retrain for employment. Where this is unjust or unfair, e.g. if there are children, a general insurance fund to which everyone could contribute (since everyone runs the risk of a broken marriage), would be a better way of giving both parties a fresh

[75] *Newton* v. *Newton* [1973] N.Z.L.R. 225; *Matangi* v. *Matangi* [1974] 1 N.Z.L.R. 55.
[76] M. Puxon, *Family Law* (Harmondsworth, 1971).

start. In addition to a capital sum or asset, both would be able to plan for the future and not just live from week to week. A further problem is how far the interests of children should effect the shaping of any property. It is recognized that in some cases the immediate division of property could be very unjust as there may be insufficient to re-house the family, but at the same time it is equally undesirable that the parties should compete for custody of the children in order to get property. A postponement of one spouse's property right for a certain term would seem to be the only solution to this problem of conflicting interests and priorities. This would be an appropriate area for the exercise of judicial discretion.

These factors, it is submitted, indicate that a system of fixed and equal rights as to property, plus a discretionary right of maintenance or a social insurance system operating for the benefit of everyone in economic need, would be an appropriate one for New Zealand in the divorce or marriage breakdown situation. In the death situation over and above an equal share of assets the surviving spouse should at least have a life interest in all those assets necessary to maintain the standard of living enjoyed during the marriage. Finally, any system, especially in an era of different and conflicting ideologies of marriage, must recognize no system will be suitable for all but, in taking account of the exceptions (e.g. someone with considerable assets before marriage), we should not destroy that most suited to benefit the greatest number of people. The answer lies not in subjecting people to an arbitrary discretionary system, but in providing the right to the individual to contract out of the system.