THE MATRIMONIAL PROPERTY ACT, 1976

by
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INTRODUCTION

The purpose of this paper is to outline the policy considerations that led to the passing of the Matrimonial Property Act 1976.

To give the reader a clear view of these considerations a brief attempt has been made to give an historical outline — particularly since the passing of the Matrimonial Property Act 1963. However, it should be emphasised that the paper is **not** intended as a comprehensive analysis of the 1976 Act; it has been prepared with the knowledge that two further papers are to be presented at this same seminar and which have that express intention. This effort should only be read in conjunction with those papers.

TERMINOLOGY

In this paper the Matrimonial Property Act 1963 is referred to as "the 1963 Act". The Matrimonial Property Act 1976 (as finally passed[1]) is referred to as "the 1976 Act". Because the 1976 Act differed in a number of material respects from the Bill which was first introduced in 1975 that Bill is, accordingly, referred to separately as "the Bill". Contemporaneously with the introduction of the Bill the then Government published an Explanatory Paper [2] which is referred to in this paper as "the explanatory paper". References to "the Committee" are in all cases (unless otherwise indicated) to the Statutes Revision Select Committee which considered the Bill in 1976. It should be noted that, at various times, other committees were involved with the Bill and/or its preparation; these included the 1972 Joint Law Society/Department of Justice Committee, the 1975 Select Committee on Womens' Rights and the Government and Opposition Caucus Justice Committees.

THE MATRIMONIAL PROPERTY ACT 1963

It is not the intention of this paper to reiterate the provisions of the 1963 Act (which are well known and now, largely, redundant).

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1. The Bill was actually reported back from the Statutes Revision Select Committee with most of the amendments with which it was finally passed. After the Bill had been reported back the Minister of Justice introduced a Supplementary Order Paper (the procedural means whereby amendments are made to a Bill during the clause-by-clause debate in the Committee of the Whole) which did make some further amendments. However to avoid confusion this paper makes the (incorrect) assumption that the Bill, as reported back from the Select Committee, was as finally passed.
2. Matrimonial Property — Comparable Sharing — An Explanation of the Matrimonial Property Bill 1975 — Parliamentary Paper E.6.

It is, however, important to observe that the 1963 Act was something of an "afterthought". The then Minister of Justice, the late Hon. J.R. Hanan, had already introduced the Matrimonial Proceedings Act 1963 which made important changes to other aspects of matrimonial law and, at fairly short notice, arranged for a Bill to be prepared and introduced to deal more adequately with questions of property, which were at that time covered by the Married Women's Property Act 1952. Although the 1963 Act represented a substantial advance on the previous legislation it still had many defects. Not the least of these was the fact that the Act was largely procedural in form; it dealt with questions arising in criminal proceedings [3], proceedings in tort between husband and wife [4], and used terminology such as "in any question between husband and wife as to the title to or possession of property" [5].

Furthermore the 1963 Act took the previous law as its starting point and merely added a gloss to it. A spouse still had to rely upon "contribution" as the foundation for any property application against the other.

Such defects might, perhaps, have been regarded as being of little consequence had not a number of substantive problems also arisen in the practical application of the 1963 Act:—

1. There was much uncertainty as to how the law would be applied in any case. The decided cases indicate that results could differ significantly on seemingly similar facts and could, indeed, depend a great deal upon which judicial officer determined the matter. This was inevitable where the Court was given such a wide discretion.
2. It was often suggested that the practice of the Courts had been less than generous (particularly to wives).
3. The decision of the Court of Appeal in *E.* v. *E.* [6] raised the problem of specific contribution to specific assets — and high-lighted the difficulties of a wife who was unable to prove such contribution.
4. The overlapping, and in some ways conflicting, jurisdictions of the 1963 Act with the Matrimonial Proceedings Act 1963 gave rise to inconsistencies.

There were other problems as well — not the least of which was the inability of a spouse to lodge a caveat to protect his/her interest, the inability of the Court to interfere with maintenance orders when making a Matrimonial Property Order and the narrow "range" of orders which the Court could in fact make in determining a property application.

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3. Sec. 3
4. Sec. 4
5. Sec. 5
6. [1971] NZLR 859 (C.A.)

THE MATRIMONIAL PROPERTY AMENDMENT ACT 1968

The 1963 Act was the subject of five amendments (including two inserted by the Domestic Proceedings Act 1968 and the Administration Act 1969); the most important of these was the Matrimonial Property Amendment Act of 1968 which (**inter alia**) inserted Section 6A (which substantially limited the relevance of misconduct).

1972 COMMITTEE REPORT

In 1969 the New Zealand Law Society made representations to the then Minister of Justice (the late Hon. J.R. Hanan) relating to the effect of insolvency on the rights of spouses under the 1963 Act. The Minister, in turn, raised a number of other matters of concern regarding the Act and suggested that all these matters could usefully be discussed between the Society and the Justice Department. In the result a special committee was established comprising Mr S.C. Ennor of Auckland and Mr A. Hearn of Christchurch (both nominated by the Law Society), Mr R.G.F. Barker (Justice Department — Legal Adviser) and Mr B.J. Cameron (now Deputy Secretary for Justice — who also acted as convener).

In its unanimous report, presented to the Minister of Justice in June 1972, the Committee said:—

"We are satisfied that there is a need to enact as soon as possible a single, clear and comprehensive statute to regulate matrimonial property in New Zealand. The Matrimonial Property Act 1963 has already been much amended; there are several illogical differences between the Act and Part VIII of the Matrimonial Proceedings Act 1963; there remain a number of internal anomalies and defects; and further attempts at piece-meal amendments are likely to compound rather than resolve these difficulties. Furthermore, the 1963 Act was tentative in policy and was in form engrafted upon a primarily procedural section of the Married Women's Property Act 1952, first enacted in 1884. We believe that public and professional opinion has moved a considerable distance since 1963, and that the time has come for a coherent and rational code on this most important subject of the property relations between husband and wife. [7]"

The Committee also recommended that such a matrimonial property code should be based on the 1963 Act, but should have incorporated into it most of the provisions of Part VIII of the Matrimonial Proceedings Act 1963 (as well as the new provisions which the Committee proposed).

The committee further recommended that:—

1. The new Statute should extend to all the assets of the marriage (i.e. all property acquired in contemplation of the marriage by either party or since the marriage by either party — otherwise than by gift, inheritance

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7. "Matrimonial Property Report of a Special Committee" June 1972 p.1. para 3.

etc. — and any accretion, during the marriage, in the value of previously-owned property).

2. The concept of contribution should be related to the marriage assets in general so that a "global order" could be made — although the Committee did recognise the special position of the matrimonial home.
3. The Court should be obliged in all cases (and not merely those relating to the matrimonial home) to have regard to contributions made to the property.
4. In addition to the types of order which the Court could make pursuant to the 1963 Act it should be permitted to authorise one spouse to occupy the matrimonial home to the exclusion of the other and to order the payment of a lump sum from one party to another.
5. A substantive approach should be substituted for the procedural approach of the 1963 Act.
6. A "common intention" [8] should only be binding on the parties where the event that has happened (e.g. divorce, death of one spouse etc.) was clearly in the contemplation of the parties when that common intention was formed.
7. On the bankruptcy of one spouse his or her assets only should be available to creditors, and that the rule in *Donnelly v. Official Assignee* [9] should be abrogated to allow an application by one spouse to be brought against the other's assignee in bankruptcy.
8. A spouse whose name does not appear upon the title should be entitled to register notice of his or her interest.
9. The Court should have power to hear such evidence as it thinks fit whether or not that evidence is legally admissible under the ordinary rules of evidence.
10. In any new code the jurisdiction of the Court (in the conflict of laws sense) should be specified.

THE JOINT FAMILY HOMES AMENDMENT ACT 1974

Section 7 of Joint Family Homes Amendment Act 1974 provided that, on the registration of a Joint Family Home, the spouses were to become the legal and beneficial owners of the home property as joint tenants. The amendment created a presumption of an equal interest in the proceeds of the sale of the home; Parliament clearly intended that this presumption should be capable of being rebutted and, specifically, that the Court should retain a discretion to make orders under the Matrimonial Property Act 1963. [10]. Nonetheless most non-lawyer Parliamentarians would have been

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8. Sec. 6 (2) 1963 Act.
9. [1967] NZLR 83 (S.C.)
10. Parliamentary Debates (Hansard) pp 5657-5660.

surprised at the very ready manner in which the Courts were prepared to rebut this presumption of equality. In this apparent "thwarting" of their legislative intention one can possible find the origin of legislature's desire to write, into the Bill and finally the 1976 Act, clear and unequivocal directions to the Judiciary as to its intentions, and, as to the manner in which the presumption of equal sharing was (if in any circumstances) to be rebutted.

THE SELECT COMMITTEE ON WOMEN'S RIGHTS

The 1975 Select Committee on Womens' Rights, in its report to Parliament took the question of equal sharing of matrimonial property one step further, when it said:—

". . . the law should presume that the husband and wife's respective contributions to the marriage assets are of equal value thereby entitling each to an equal share in these assets. We do not envisage that the rule of equal division would be applied rigidly, but rather that it would function as the basic principle for assessing the disposal of marriage assets in place of the existing provisions under which the wife's share of property, accummulated during the marriage, is determined at the discretion of the Court". [11]

1975 ELECTION MANIFESTOS

In its 1975 Election Manifesto the National Party stated:—

"National believes that the law must treat marriage as a partnership of equals with reciprocal obligations, and will legislate to provide for a **rebuttal presumption** that, when a marriage is legally terminated, **matrimonial property acquired during the marriage is to be shared equally between the spouses.** The courts will be permitted to override this presumption where considered necessary in the interests of fairness and equity". [12] (Emphasis added).

Having introduced the Bill, and published the explanatory paper, the Labour Party's attitude had been fairly clearly expressed. Nonetheless it, too, in its manifesto stated:—

"The Matrimonial Property Amendment Bill marks a radical new approach to a very difficult problem. It deals with the division of property between spouses who are living but estranged. To extend this to cover surviving spouses presents knottier problems but the Government's Exploratory Paper indicates the lines along which it is thinking." [13].

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11. Report of Select Committee on Womens Rights — June 1975.
12. National Party 1975 General Election Policy s.34 p.3.
13. The Labour Party Manifesto 1975 p.31.

THE 1975 MATRIMONIAL PROPERTY BILL

The Matrimonial Property Bill was introduced by the then Minister of Justice, Hon. Dr. A.M. Finlay, at the end of the 1975 Parliamentary Session. After a brief and non-contentious introductory debate the Bill was read a first time and referred to the Statutes Revision Committee for recess study.

Following the change in Government there was some speculation that the Bill would not be proceeded with; this speculation was in seeming ignorance of the National Party's Manifesto undertaking. Nonetheless it was necessary for the new Government to give careful consideration to the Bill to see whether, if amended, it could be used as a vehicle to implement its election policy. Finally in a speech to the New Plymouth North Rotary Club on 13 May 1976 the Minister of Justice, Hon. David Thomson, said:—

"(The National Government is) committed to legislating to create a presumption of equal division of . . . matrimonial property between husband and wife should the marriage break up. A presumption which will, however, be able to be displaced in proper circumstances. This represents a very important social advance and in its concept represents a bold step forward . . . When we took office we looked into the Bill and found that, broadly, it was consistent with our election policy and we propose to go ahead with it subject to any changes that may suggest themselves in the light of evidence to be given on the Bill . . . The Bill is perhaps a little less radical than the words of the Government Election Policy, read literally, in that it confines the starting point of equal division to that part of matrimonial property which it terms "domestic assets". It is also more than a little complex but this may well be justified."

The Statutes Revision Select Committee therefore proceeded to consider the Bill, taking the first evidence in mid-1976.

The Committee — which save for one issue (the inclusion of **de facto** marriages) dealt with the Bill on a completely non-partisan basis — comprised Hon. David Thomson, Mr B.E. Brill, Mr D.M.J. Jones, Mr D.F. Quigley, Marilyn Waring, Hon. Dr. A.M. Finlay, Hon. A. Faulkner, Mr J.L. Hunt, Mr R. Prebble and the writer as Chairman. It is interesting to note that for the first time since the 1940's the majority of the Statutes Revision Committee were qualified lawyers — nearly all with recent experience in practice.

SUBMISSIONS TO THE SELECT COMMITTEE

The Select Committee received a total of 51 submissions from individuals and organisations — a number of whom were heard in person. Although the New Zealand Law Society made submissions surprisingly few practising lawyers tendered their personal views — although several assisted in the preparation and appeared in support of submissions prepared by organisations such as Federated Farmers, various Zonta Clubs and the Women's Electoral Lobby.

Although by no means approaching unanimity (some submissions were strongly opposed to the Bill) the majority gave it qualified support.

SOME MATTERS OF GENERAL CONSIDERATION

[a] The General Approach:

The 1976 Act's underlying principle, which appeared to command wide (although not universal) acceptance, is that marriage is an equal partnership to which each spouse contributes in different ways according to his or her ability, and that the division of property between the spouses, if the marriage breaks up, should reflect this. It follows that an income-earning contribution should not be regarded as having greater value than contributions in other forms. The 1976 Act is not primarily a device for giving wives more matrimonial property than they have hitherto received. Certainly in many cases it will have that effect, but its essential purpose is to provide for a fair and just sharing of assets.

[b] The Complexity of the Bill:

Some witnesses were critical of the complexity and detail of the Bill. Whilst sympathising with this view the Committee concluded that any substantial "simplification" would be deceptive and illusory because it would simply transfer to the unpredictable process of judicial interpretation the answering of important questions that pose themselves in any attempt to reform Matrimonial Property law. The elaborate detail into which the various Canadian Law Reform Bodies have found it necessary to go, in their recommendations on the subject, suggests that it is simply not possible to state the law in this area in a series of simple propositions. Similarly the Swedish Law, which provides for equal sharing, is a complex code.

[c] Overseas Legislation:

Community of property between husband and wife (with equal division when the marriage ends) exists in the laws of the majority of European and European-settled countries outside the common law jurisdictions. These countries embrace the widest social and ideological diversity, from the traditional and conservative (Quebec, Spain) to the most liberal and radical (Denmark, Sweden) and from the capitalist orientated (California, Texas) to the eastern bloc (Hungary, Poland).

In Canada (where outside Quebec the present law is similar to that of New Zealand before 1963) very comprehensive reports have recently been delivered by the Law Reform Commissions of Canada and of several provinces. These have, without exception, favoured the concept of an equal sharing of matrimonial property between husband and wife.

THE MAJOR POLICY CONSIDERATIONS

In the opinion of the Committee the Bill (and the submissions made on it) raised a number of important issues:—

1. The scope of matrimonial property (Section 8)

With one exception the submissions did not display any fundamental

disagreement with the proposed definition of matrimonial property although for drafting reasons it became necessary to define matrimonial and separate property in separate sections (8 and 9)

2. The division of matrimonial property (Sections 11-14)

The Bill originally divided matrimonial property into two categories — domestic and general assets; it provided for the equal division of the former (subject to a rebuttable presumption — clause 9) and for the latter to be divided according to the spouses contribution to the particular asset (clause 13) — hence the reference by the Minister of Justice, in his New Plymouth speech, to the Bill "being perhaps a little less radical than the Government General Election Policy" (which simply provided for "a rebuttable presumption . . . (that) matrimonial property acquired during the marriage is to be shared equally between the spouses . . .").

Studies in England have shown that married couples tend to regard the matrimonial home and family possessions in a different light from other assets — and there is no reason to believe that the New Zealand attitude is very different.

The 1974 Amendment to the Joint Family Homes Act recognised this different "status" for these particular assets (or at least the home) by providing for joint ownership and equal division of the proceeds of the sale of a Joint Family Home. It was only logical that both the Bill and ultimately the 1976 Act should extend this concept to **all** matrimonial homes.

Accordingly sections 11 to 14 provide that the matrimonial home (or an allowance for a homestead or moneys set aside for a home or an allowance therefor) and the family chattels shall be divided equally unless the marriage has been of short duration or there are extraordinary circumstances that in the opinion of the Court render repugnant to justice the equal sharing of these assets; if these latter circumstances arise the share of each spouse shall be determined in accordance with the contribution of each spouse to the marriage partnership.

Having dealt, in this way, with those assets which will probably comprise the only matrimonial property in the majority of cases, it was then necessary for the Committee to decide upon the manner in which the remainder of matrimonial property (other than the home and chattels) should be divided. It was immediately clear that there would be great difficulty in applying the same rules (i.e. as in sections 11 to 14) to the remaining matrimonial property. Both the public and the Courts would certainly consider it unfair that a spouse who had made no contribution to the building of an extensive business property may nevertheless be entitled to receive half thereof. There would be a real danger that the Courts would shrink from ordering an equal division of the home and chattels if that finding was also, automatically, to result in an equal division of the remaining matrimonial property. Accordingly it was clearly necessary to differentiate between the home and chattels on the one hand and the remaining matrimonial property on the other.

On the other hand, again, the Government's manifesto undertaking was to "legislate to provide for a rebuttal presumption that . . . **matrimonial property** acquired during the marriage is to be shared equally between the spouses" (emphasis added). Accordingly the Act provides that the matrimonial property **other than the home and chattels** shall be dealt with separately and section 15 divides it equally between the spouses **unless one can show that "his or her contribution to the marriage partnership has clearly been greater than that of the other spouse".** In the event that this presumption is rebutted the share of each in the matrimonial property is to be determined in accordance with his or her contribution to the marriage partnership.

3. The concept of "contribution".

Until the decision of the Privy Council in *Haldane* v. *Haldane* [14] (and particularly as a result of the decision of the Court of Appeal in *E.* v. *E.*) the Courts were bound to adopt a "contribution to the asset" approach. Even had this concept not been rejected by the Privy Council it is almost certain that the Select Committee would have done so — regarding the approach, although perhaps convenient, as artificial and presenting considerable difficulties where specific assets, or a limited number of assets, are in dispute.

The Committee preferred, instead, to adopt the concept of "contribution to the marriage partnership" thereby returning very much to the approach contemplated by Woodhouse J. in *Hofman* v. *Hofman*:— [15]

"Marriage is a partnership of a very special nature and with respect I think (the 1963) Act puts a proper emphasis upon that fact. In my opinion it enables the Court to consider the true spirit of transactions involving matrimonial property by giving due emphasis not only to the part played by the husband, but also to the important contributions which a skilled housewife can make to the general family welfare by the assumption of domestic responsibility, and by freeing her husband to win the family income they both need for the furtherance of their joint enterprise. Each is in a unique position to support or to undermine the constructive efforts of the other, and it appears to me that considerations of this sort will now properly play a considerable part in the assessment to be made. 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 that women who have devoted themselves to their homes and their families need not suddenly find themselves facing an economic frustration (at least in the area of family assets) which their husbands or wives who are wage earners have usually been able to avoid. The purpose of the (1963) Act

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14. (1975), (unrep) (P.C.)

15. [1965] NZLR 795 (S.C.)

in my view is to enable possession to be given or a just and proper apportionment to be made of those capital family assets which Denning L.J. referred to in *Fribance* v. *Fribance* [1957] 1 W.L.R. 384, 387 [1957] 1 All E.R. 357, 359 as "the things intended to be a continuing provision for the parties during their joint lives"; the working capital of the **marriage partnership** as they may be generically described in contrast, for example, with formal gifts or investments brought to the marriage by one party or the other or achieved by incomes ranging well outside normal family needs." (emphasis added).

Having adopted the term "contribution to the marriage partnership" it was immediately apparent that such "contribution" had to be defined carefully in order to avoid throwing the whole marriage open to judicial scrutiny; that would present the Courts with a formidable and invidious task and would lead to much uncertainty and disparity. Accordingly Section 18 provides an exhaustive definition of "contribution to the marriage partnership".

Furthermore the section provides (perhaps unnecessarily in view of the exhaustive definition of "contribution") that there shall be no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature and also eliminates conduct from the notion of contribution except in circumstances where (using the general formula of the 1968 amendment but preferring the words of the Privy Council in *Haldane*) the misconduct has been "gross and palpable and has significantly affected the extent or value of the matrimonial property."

4. Agreements between spouses (section 21)

There was no serious contention before the Committee that spouses should be prevented from making property arrangements between themselves that would differ from the scheme of the Act. Special arrangements may sometimes be particularly necessary (for instance in the case of a second marriage).

On the other hand there was widespread concern lest a more sophisticated and stronger partner should prevail upon the other to sign away his/her rights. For this reason section 21 (4), (5) and (6) provides a specific formula for the validity of such an arrangement (with a general power for the Court to "absolve" any minor irregularity — 21 (9)). The Committee was also concerned with the problem of agreements entered into many years before any real question as to the division of matrimonial property might have arisen. In order to overcome the possibility of abuse the Court was therefore given power to override such an agreement in the interests of justice (21 (8) (b) and 10)).

5. Registration of Notice of Interest (section 42).

Most submissions supported this provision in principle (although surprisingly some doubted whether it would be much advantage in practice). Because it is contemplated that such a notice might in some circumstances be lodged when there are in fact no "unhappy differences"

between husband and wife it was considered appropriate that the registration should be of a "Notice of Claim of Interest" rather than a Caveat — although it was necessary, in section 42 (3), to give the notice similar legal effect to that of a caveat.

6. Rights of Creditors (section 20)

Although of considerable importance the original clause (11) in the Bill attracted few submissions.

In its original form the Bill provided that the share of each spouse in the matrimonial property should be free from the claims of unsecured creditors of the other spouse while the whole of the property would be liable for debts incurred jointly or for a common purpose. This scheme was in accordance with the recommendations of the 1972 Committee but had the disadvantage of reducing the property potential available to unsecured creditors thus making them possibly more reluctant to give credit to married persons.

The alternative approach (which was finally adopted by the Committee) was to provide that each spouse should have a protected interest in the matrimonial home to the extent of $10,000 or half of the equity of each spouse in the home — whichever is the lesser.

Special provision is made for the payment of secured or unsecured personal debts. Although the Act specifically provides that nothing under section 20 shall derogate from the provisions of the Joint Family Homes Act 1964 it is clear that in taking this step (and in the same Act providing for equal division of the proceeds of the home and in the same year legislating for automatic death duty exemption for a matrimonial home) the usefulness of the Joint Family Homes Act has largely been superceded.

7. The Transitional Provisions (section 55)

It was recognised that, at whatever date the Bill took effect, there would be those who would prefer to have their particular cases dealt with under the 1963 Act! It was further recognised that any commencement date would, of necessity, be an arbitrary one.

Matrimonial property proceedings are usually protracted — and can sometimes take 18-24 months from the time proceedings are issued until the matter is heard. If the legislation had provided that all proceedings issued prior to a given date were to be heard under the 1963 Act, cases under that Act would continue to be heard for several years — and at the same time the Courts would (in respect of more recent cases) be applying the new law.

The second alternative would have been to delay the commencement date until, say, late 1977 thereby allowing the majority of actions commenced under the 1963 Act to be disposed of. This would, however, result in a chaotic situation for the Courts. Those parties who wanted to have their cases heard under the 1963 Act would be pressing for early (often premature) fixtures. On the other hand those who considered that their cause would be better served by the 1976 Act would be seeking delays and the Courts could be subjected to spurious applications for adjournment.

In the final analysis the Select Committee decided (having rejected the possibility of a lengthy "tail" or "phase-out period" for the 1963 Act, and having also rejected the chaotic possibility inherent in a delayed implementation of the 1976 Act) that the only alternative was to provide for a relatively early commencement date (1 February 1977) and to make it possible for any case which has not actually reached a hearing by that date to be determined under the new legislation.

It has been suggested that such an arbitrary provision renders an injustice to those who have elected to bring their proceedings under the 1963 Act. That contention is, however, fallacious; up until the passing of the 1976 Act any party involved in a matrimonial property dispute had no option other than to issue his/her proceedings under the 1963 Act (because that was the only legislation which directly dealt with questions of matrimonial property).

The short point of the matter, however, is this: if the legislature has decided that the present matrimonial property code no longer meets the needs of society — or the ends of justice — then it is only proper that all matrimonial property disputes should be determined in accordance with the new code from the earliest possible opportunity — and that is what the Act provides.

8. Claims after death (section 5)

Both the Bill and the 1976 Act provide that proceedings under the 1976 Act can only be instituted whilst both parties are alive. This is in direct contrast to the previous position — it having become increasingly common for a party to a marriage whose interest had not been adequately protected under a will not only to issue proceedings under the Family Protection Act 1955 but, contemporaraneously, to take action under the Matrimonial Property Act 1963.

A number of submissions advocated that the principles in the Bill should be extended to operate after the death of one spouse. There was general agreement with that proposition — however the Bill itself could not simply be so extended. Quite apart from the substantial interference with testamentary rights that would be involved in legislating for the equal division of property on the death of one spouse, the death of one of the parties raises a number of difficult and complex issues; the Minister of Justice has directed the Department of Justice to examine this question in detail with a view to the possible introduction of legislation at a relatively early stage.

In the meantime the 1963 Act must continue in force for the limited purpose of enabling matrimonial property proceedings to be instituted after the death of one party; this is an interim situation which all would regard as unsatisfactory but unavoidable.

HALDANE'S CASE

Copies of the decision of the Judicial Committee of the Privy Council in

Haldane v. *Haldane* became available to the Select Committee while it was deliberating on the Bill. Within the context of the Committee's deliberations on the Bill the decision made three important points:—

(1) the concept of contribution was an essential principle of the 1963 Act;
(2) contributions may be indirect (i.e. a contribution in the home may be a contribution not only to that home but other assets as well); and
(3) an "asset by asset" was not justified by the terms of the 1963 Act — the property should be looked at as a whole.

It was really only in (3) and in the application of (2) that the Privy Council clearly departed from the view of the Court of Appeal. Their Lordships' other comments are more by way of observation — neither necessary to the decision nor strictly in disagreement with the lower court (e.g. the position of family farms, the treatment of gifts and bequests and the approach to questions of misconduct). The Privy Council clearly regarded the 1968 amendment as a substantial clarification of the intention of Parliament and also placed considerable emphasis on the state of the law before 1963.

Although the decision certainly clarified the 1963 Act it did not, in the opinion of the Select Committee, avoid the need for further legislation. This was particularly so because:—

(a) It was still necessary for one spouse (usually the wife) to establish a contribution to the other's property. The approach remained one of "his" and "hers" rather than "theirs".
(b) The manner of assessment of an applicant's interest was left at large and still dependent upon the view of the individual judicial officer. Mrs Haldane received $19,000 out of an estate worth $118,500 after 29 years of marriage, rearing five children and without any suggestion that she had failed to "pull her weight" and notwithstanding a specific finding that her services and management contributed to the husband's ability to develop his property. Why she did not receive some higher figure remains (at least to this writer — and with respect) as something of a mystery.
(c) A rebuttable presumption of equal division could not easily be imported into the 1963 Act. Only a new statute could establish the presumption of equal division and deal with all of its legal consequences.
(d) The decision did not (it could not) deal with many of the other problems that had arisen under the 1963 Act; e.g. the right of one spouse to claim against the other's bankrupt estate or the right to lodge a caveat or Notice of Interest.
(e) Their Lordships commented that the 1963 Act was "extraordinarily difficult to construe as can be seen by the great diversity of judicial opinion that it has evoked". Certainly the various decisions delivered in the course of the *Haldane* litigation alone illustrate how different

Judges can take a different view of the same facts under the very broad terms of the 1963 Act.

Nonetheless the Select Committee was of the opinion that many of the Privy Council's comments were remarkably in line with, and vindicated, the approach taken in the Bill. It so happened that the three essential findings (**supra**) also formed the basis of the new legislation — but the Bill also dealt with a number of other matters that required attention.

THE EFFECT OF THE 1976 ACT ON HALDANE v. HALDANE

The reported facts in *Haldane* are insufficient to assess what might have been the wife's specific entitlement under the 1976 Act. Specifically evidence is lacking on:

(i) the value of the homestead (a fact which gave the Court of Appeal difficulty in quantifying the wife's interest);
(ii) the nature and value of the family chattels; and
(iii) the nature and value of the matrimonial property (other than the home and chattels).

In any case the crucial feature of the wife's position under the 1963 Act, by contrast with the 1976 Act, is that under the former she was entitled to nothing unless she could establish a contribution. Under the latter she would have been entitled as of right, to a specific share in the matrimonial property unless her husband could rebut the presumption of equality.

Nonetheless, because the *Haldane* decision represents the latest (and now presumably definitive) statement on the 1963 Act it is useful to compare the manner in which the wife's claim would have been dealt with under the two Acts:—

(a) Matrimonial Property Act 1963

The wife received a one quarter share in the last lot of the farm property remaining in the husband's ownership; why she should have received that share in that piece of land is not readily apparent. She also received the sum of $4,000; the only reason suggested for this award is that it was the sum which stood to the husband's credit in his local bank account. In total she received $19,000 but why the Supreme Court decided her contribution was worth only this amount and not more is unclear.

(b) The Matrimonial Property Act 1976

Under the 1976 Act the wife's claim would have been considered under three "headings":—

(i) The matrimonial home and family chattels would have been dealt with in accordance with the following principles:—
   — that the home and chattels are matrimonial property whenever and howsoever aquired (section 8 (a) and (b));
   — that a cash allowance would be made for a homestead (section 12); and
   — that equal division would not be permitted if it is repugnant to justice (section 14)

On the available facts this case could hardly be described as one in which equal division would be repugnant to justice and the wife therefore would probably have received half of the value of the homestead and the family chattels.

(ii) The matrimonial property, other than the matrimonial home and family chattels, would have been dealt with on the following principles:-

— that the property in question should be divided equally (section 15 (1);

— that equal division would not occur if one spouse could establish that his/her contribution to the marriage partnership had clearly been greater than that of the other (section 15 (1)); and

— that "contribution" would be assessed in accordance with the principles set out in section 18.

Testing the available facts against these principles does not suggest that either spouse made a clearly greater contribution to the marriage partnership than did the other. The wife would probably, therefore, have received half the matrimonial property other than the home and chattels.

(iii) The separate property would have been dealt with on the following principles:—

— that "separate property" would include that acquired by gift from a third party (sections 9 and 10);

— that the gifted property would remain as separate property unless it had been so intermingled with other matrimonial property that it is unreasonable or impracticable to regard it as separate property (section 10 (1)); and

— any income from the separate property used with consent for purpose of the matrimonial property would become matrimonial property (section 9 (b)).

Under this formula the farm was, and would almost certainly have remained as, separate property. Any income therefrom which had been used with the husband's consent for the purpose of other matrimonial property would become matrimonial property and would be divided equally.

In summary, therefore, the wife would probably have received half the matrimonial property the value of which could have been increased by income from the husband's separate property. Certainly she would have benefited under the 1976 Act, but in the absence of detailed information, the extent of such benefit is impossible to assess.

OPPOSITION TO THE BILL

After the Bill had been reported back to the House by the Select Committee, opposition to its provisions came from several quarters.

The N.Z. Federated Farmers expressed concern at the implications on farming enterprises and particularly at the possibility that a farm property might be "split up" as a result of a Court decision. The views expressed by the Federation did, however, appear to ignore the fact that even the 1963

Act had made such a division theoretically possible and also seemed to take too narrow a view of the provisions of section 15. The very brief analysis of the *Haldane* decision gives some general idea of the likely effect of the 1976 Act on a fairly typical farming situation. It is not without significance that Federated Farmers made submissions to the Select Committee and at that time was counted as one of the more enthusiastic supporters of the Bill!

The N.Z. Chambers of Commerce (more than somewhat belatedly) became concerned at the provisions of the Bill relating to creditors and circulated a memorandum — which completely overlooked (or misunderstood) the provisions of both the 1963 Act and the Joint Family Homes Act 1964!

The N.Z. Organisation of Men (which had opposed the Bill before the Committee) continued its opposition claiming that the new law would encourage spouses to "walk out" on their marriage partners "taking half the property with them."

Finally the N.Z. Law Society (and some lawyers — and several litigants who had a direct interest in the matter) objected to the transitional provisions.

In addition one practitioner (who had earlier made submissions to the Select Committee) wrote to the writer (in his capacity as Chairman) suggesting that the *Haldane* decision removed the necessity for new legislation. This suggestion overlooked the obligation to legislate for equal sharing (which could, in no way, be spelled out of the *Haldane* decision) and also the other matters that were considered by the Select Committee when the Privy Council's Opinion became available.

CONCLUSION

The Matrimonial Property Act 1976 represents an important piece of social legislation. Its evolution can be clearly traced from the Matrimonial Property Act 1963 (which was, in itself, a significant advance on previous legislation). It also represents — and this is important for any political party — the specific implementation of a policy undertaking by the present Government. If there is a certain rigidity in the presumptions that are to be applied and the rules that are laid down that fact possibly has its origin in the decisions of the Courts (particularly since 1971) and the judicial interpretations previously applied to matrimonial property (and joint family home) legislation.

The legislature has now clearly determined that there should be a general presumption of equal sharing of matrimonial property and that, in the case of a matrimonial home, this presumption should be difficult to rebut. Parliament was moving towards this when it passed the Joint Family Homes Amendment Act 1974 and has now spelled out its intention even more clearly to the Courts. It is now for the judiciary and the practising profession to give practical effect to the legislation.