The husband, in 1976, had other assets worth $66,000 made up of property purchased since the marriage. During the marriage the husband gave the wife a house, a car and jewellery worth $9,000.

What is the wife entitled to?

The home and cars, if used for family purposes, are to be divided equally unless extraordinary circumstances exist. Adultery after a long marriage during which contributions are made cannot be regarded as a s.14 circumstance. However if the wife’s house is classified as separate property in which the husband has no interest this coupled with the misconduct may be sufficient to invoke s.14.

The other assets of the husband are matrimonial property as they were acquired since the marriage. Those acquired with assets owned at the time of the marriage will be matrimonial property in so far as they were acquired to earn income for family uses — s.8 (e).

If they are matrimonial property is the husband entitled to a greater share because of clearly greater contributions? Conduct can only be taken into account in the form of the order — s.18 (3), and must be gross and palpable and have affected the property. The adultery has not affected the extent or value of the property. Does the husband’s initial financial contribution and continued efforts outweigh the wife’s general assistance note s.18 (2). A factor in weighing their general efforts to the partnership would be the gifts the wife received from the matrimonial property, though these must be balanced against any expenditure by the husband for his own purposes as we are no longer dealing with property regarded as the husband’s but with matrimonial property.

The husband’s gifts to the wife are separate property unless used for common purposes s.10 (2).

cf. EvE, 1971 N.Z.L.R. 859 — the couple were declared to be tenants in common in equal shares of the house, the husband to have exclusive possession. No other order was made.

10. Assets owned by wife on marriage — conduct — interests of children

Couple were married in 1959 and separated in 1972. There are five children of the marriage presently aged from 14 to 6 years. The wife has considerable inherited wealth. The couple came to N.Z. in 1962. In 1964 the wife purchased a cottage in her own name which the couple lived in for 9 months. The wife then purchased a house for $8,000. It was settled as a joint family home. The husband paid the housekeeping expenses and shared the outgoings on the home. The couple separated in 1972 when, by agreement, the wife was given custody and exclusive possession. In 1973 without warning the wife left the home and the children and went overseas. She has had virtually no contact with the family since. The husband moved back into the home to care for the children. He is now living in a de facto relationship with a woman who has two children

THE MATRIMONIAL PROPERTY ACT, 1976

by

J.K. McLay, LL.B., M.P.

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) 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 Women’s 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).

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.

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 on 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.

8. Gifts between spouses — orders out of separate property
The couple were married in 1964 and separated in 1976. There are two children of the marriage.

At the time of the marriage the wife owned a dairy farm worth $39,000 and other lands valued at $3,500, a car and furniture. The husband owned a van and tools together worth $2,000. After the marriage the couple jointly ran the farm and the wife gave the husband a half interest in the stock and plant. The wife sold her second piece of land for $17,000 and purchased another in the joint names of the couple of $4,000; the extra $13,000 was used to reduce the mortgage on the farm, to make improvements to it and to purchase a house. The couple shifted to the house and put share milkers on the farm. A mortgage was raised on the farm and used to purchase land in the husband's name in 1972. In 1973 the farm was sold and the proceeds used to pay the mortgage on the husband’s land. Monies from all properties were at all times paid into a joint account. After the separation the house was sold for $4,500 net. The husband has signed an agreement to sell his land to third parties for $13,583 gross, $7,583 nett. The husband's mismanagement was primarily responsible for the loss of the assets.

What is the wife's share?

The proceeds from the sale of the home must be divided equally unless the husband’s mismanagement can be regarded as an extraordinary circumstance — s.14.

The husband's land was acquired during the marriage from the proceeds of jointly owned property. Joint property is matrimonial property — s.8 (c), property purchased with matrimonial property is matrimonial property unless the husband can establish that the property was a gift to him. Even if it was a gift it was used for the benefit of both as all profits from it were paid into a joint account. It is therefore matrimonial property to be divided equally unless the wife's contributions have been clearly greater.

cf. Rehn (1976), 1 Fam. L.R. 11,115 (Aust.), the wife received the property registered in the husband's name and a half share in the house proceeds.

9. Conduct — husband having considerable assets at the time of the marriage.
The couple were married in 1954 when the husband was 41 and the wife 21. The parties were divorced on the grounds of the wife's adultery in 1976. There are two children of the marriage.

At the time of the marriage the husband had assets worth $12,300. The wife had no assets. The husband used his assets to purchase two businesses which were sold in 1975. In the initial years of the marriage the wife assisted part-time in the business. From 1958 the husband purchased, renovated and sold houses. The wife assisted with the redecoration of the houses.

The equity in the matrimonial home at the time of the divorce was $12,000.

3. Sec. 3
4. Sec. 4
5. Sec. 5
6. [1971] NZLR 859 (C.A.)
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the time of the marriage the wife had an equal basis. The father said he allowed this because he wished to encourage the husband to work for his share. The father loaned the husband $6,000 on second mortgage for 10 years at 6% to buy a farm. 44 acres were purchased for $22,600. In 1970 44 acres were purchased with mortgage monies for $15,000 and another 19 acres were obtained in the same manner in 1973 for $12,000. All the properties were worked as one unit. The farm was registered in the husband's name while the farm account was in the joint names of the parties. The net equity in the property is $60,000. The homestead is worth $20,000.

What share is the wife entitled to?

The gifts appear to have been to the couple rather than to the individual and there is considerable intermingling of the gifts with property acquired after the marriage through the efforts of the couple. Therefore all property is matrimonial property. The wife is entitled to a ½ share in the value of the homestead. Can it be said that the husband’s contributions to the partnership are clearly greater than the wife’s? The wife’s care of the child which prevented her from assisting on the farm is a contribution to the partnership.

cf. Oliff. Sup. Ct. Auckland. 1.11.76. M638/75. Barker J. — the wife received $15,000 and half interest in the home and $5,000 share in the farm.

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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 insolveney 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

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
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 and has since refused to pay maintenance or outgoings on the house. There are five children of the marriage.

Three pieces of property are in dispute.
1. The matrimonial home built in 1953 by the husband with assistance from the wife. It was valued at $25,000 with the equity of $20,000 in 1973. It is now valued at $30,000. Since the separation the wife has paid $1,000 interest on the mortgage and spent $500 redecorating the home.
2. A holiday house purchased in 1965 for $2,500. The property is registered in the wife's name for tax purposes. The wife signed an acknowledgement of debt to the husband at the time of the purchase but the husband has paid all the outgoings on the property. The property was valued at $9,000 in 1973. It is now worth $10,500. The husband has spent $500 on maintenance and outgoings on the property since 1973.
3. The husband's joinery business established in 1946. The property on which the business stands is now worth $10,000. During the marriage the wife spent 1-2 hours per week on secretarial work for the business. She received $10pw for this work from 1970. What is the value of the wife's interest in each piece of property?

1. The home is matrimonial property — s.8 (a), and is to be divided equally — s.11 (a). It is doubtful whether the fact that the husband physically built the house could be regarded as an extraordinary circumstances under s.14 (cf. Papesch, 1974 R.L. 321). It is unlikely that the husband's desertion would affect his share, though it might be a factor supporting an application by the wife for exclusive possession. The desertion and failure to pay maintenance may be regarded as reasons for quantifying the husband's interest at the 1973 value, or for repaying to the wife the outgoings she has paid since the separation before determining the value of the property available for division — see Hartley, 1976 R.L. 124, Andrew, 1976 R.L. 17, Fleet, 1975 R.L. 216. If the desertion is disregarded the court will take the current value of the property, deduct any capital payments made by the wife since the separation and repay these to her, and divide the remaining amount equally between the parties — s.2 (2) (3).
2. Is the home the wife's separate property by reason of being a gift from the husband? It is probably matrimonial property as it was used by the family and its value increased due to the husband's efforts and the application of matrimonial property — s.10 (2), s.9 (3). Should the division be equal or have the husband's contributions to the partnership clearly been greater? Five children take a lot of time and effort and the wife also gave some assistance in the business.
3. The conflict between contributions to property and contributions to the partnership, and quantifying contributions and simply asking has each party done their best, arises in relation to the business. The wife has
At the time of the separation the wife took a car valued at $1,000. The husband had a car valued at $3,000.
The husband owes $60,593 to his father and $14,343 to his mother.

B. The facts as above save that the husband purchases his father's share of the partnership in 1968. The father takes a mortgage back. The values given are the full value of the farm.

The husband's share in the initial property is separate property — s.9 (1). The second farm is matrimonial property — s.8 (e). The homestead is matrimonial property — s.8(a).

The increase in value of the first farm due to the wife's work i.e. the savings in farm wages, is matrimonial property — s.9 (3) (a). The wife is entitled to at least a half share of this increase — s.15 (1).

The second farm is to be divided equally — s.15 (1) unless the contributions of one are clearly greater. The property was not gifted from the parents, the husband paid no money for it, the wife's contribution to the marriage partnership is arguably clearly greater than those of the husband.

Should the wife share in the inflationary increase in value of the second farm since the separation when the husband will have the continuing mortgage liability (although he will also have the property)? The wife is entitled to a half share of the value of the homestead — s.12 (1).

Both cars were matrimonial property and their value, presumably the value they had at the time of the separation, should be shared equally. The wife's share in the second farm and homestead may be increased by virtue of her work on the farm which is the husband's separate property — s.17.

b. One half of the first farm now becomes matrimonial property — s.8 (e).

There is an argument that property obtained out of separate property or income from separate property is separate property. But here the farm can be said to have acquired for common benefit so it is matrimonial property — s.8 (e), more importantly no cash was paid for it. The question is whether the husband's contribution to the partnership has been clearly greater than those of the wife. The property was obtained because of the relationship of the husband to the seller but the loans were business loans (although they might be forgiven at some later date) and the wife will only share in the equity which she helped to build up.

cf. Akehurst, 1975 R.L. 275 — the wife received $17,000.

6. Gifts between spouses — husband's business — date of fixing value of shares.
The couple were married in 1944. The husband left the family in 1973

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 possibly 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, accumulated 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

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.

When the couple separated the husband retained 30 acres of the property (worth $60,000) and subdivided and sold the remainder for a net profit of $42,800. With this money he has since purchased other assets and now has assets worth $118,500. The wife has no assets and is receiving $50pw maintenance.

Was the farm a gift? If it was not a gift it was matrimonial property s.8 (e). If it was a gift does s.10 (1) apply? The same questions apply to the amount of the mortgage which was forgiven.

The homestead would have been matrimonial property — s.8 (a), s.10 (3). However it was sold with no intention of another being bought therefore to obtain her interest the wife must apply under s.11 (3) (b) but as there is no other matrimonial property for an order to be made out of do s.33 (3) (n) or s.20 (6) apply?

If the farm was separate property the wife may apply under s.17 (1) (b), if it was matrimonial property s.15(1). Can it be said that the husband's contribution to the partnership was clearly greater when he put little effort into maintaining the farm. The property the husband now has was, except for the thirty acres, acquired after the separation and therefore separate property — s.9 (4). However if it was acquired with the proceeds of the sale of matrimonial property this might be a reason for the court to decide that s.8 (b) governs and it is matrimonial property. If not the wife must ask for a joint share under s.33 (3) (n).

Should the wife's share be fixed at the unimproved value the property had at the time of separation?

Cf. Haldane. The Privy Council ordered that the husband give the wife $19,000 i.e. they reinstate the Supreme Court order which was based on quarter share of the value of the 30 acres held by the husband plus $4,000.

5. Contributions to separate property
A. The couple were married in 1956 and separated in 1972. There are three children of the marriage. At the time of the marriage the husband was a tenant-in-common in equal shares with his father on a farm.

Throughout the marriage as well as taking full responsibility for managing the household and for child care the wife worked 6-8 hours a day on the farm milking and doing general farm chores. She was unpaid except for the last 12 months when she received $100 p.m. In 1966 the partnership purchased a second property with mortgage monies plus a $12,000 loan from the husband's mother and $1,000 from the farm account. Both properties were run as one unit. In 1972 the husband's share of the farm was valued at $91,700. At present the husband's share in the first property is valued at $109,000 and the second property at $77,000. The homestead has a value of $20,000.
3. Contributions to the marriage partnership

The couple were married in 1947 and separated in 1975. There are five children of the marriage, one still dependant.

Neither party had any assets at the time of marriage. In 1957 a farm was purchased without capital outlay. From the birth of a child in 1958 the wife suffered from recurrent depression which affected her ability to assist on the farm and in the home. The farm was sold in 1965 for $8,400. The proceeds were used to purchase the home property now in dispute and an adjoining section. From 1965 the wife worked part-time and used her income for her own needs. The house has a value of $13,400 and the section $1,600.

What is the wife's entitlement?

The home is matrimonial property to be divided jointly unless extraordinary circumstances exist — s.11 (1) (a), s.14. The wife contributed little to the marriage after 1958. However it can be argued that she did what she was psychologically able to. This was not a case of voluntary disregard of family duties. Section 14 should not be used.

The section is matrimonial property subject to division under s.15 (1). It is likely that the husband’s contributions will be regarded as clearly greater than those of the wife. The clash between evaluating contributions and regarding the test as one of whether best efforts have been made arises directly here.

cf Haycock, 1974 1 N.Z.L.R. 409 — the nett amount for division was $12,400 (a sum was set aside for child maintenance), the wife received a quarter share.

4. Gifts from third parties — sustenance of separate property

The couple were married in 1940 and separated in 1969. There are five children of the marriage. The husband worked on his father's farm until 1945. In 1945 the husband obtained a farm through his father. The farm was subject to a mortgage to the Public Trust of $12,600 and one of $5,300 to the husband's father. By 1955 the mortgage to the husband's father had been reduced to $2,500 and this amount was forgiven. The husband received $29,000 under the terms of his father’s will in 1955. $11,600 of this was paid to the Public Trust and a further $7,000 spent on capital improvements on the farm. Despite the payment to the Public Trust the mortgage increased steadily during the marriage. The wife performed a mainly domestic role during the marriage although she gave some little assistance on the farm at harvest and shearing time.

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.

MATRIMONIAL PROPERTY PROBLEMS

1. Definition of matrimonial home — property purchased in contemplation of marriage.

In contemplation of marriage the husband purchased a house which, although not legally subdivided, was divided into two flats. The husband paid $7,500 cash and a mortgage for the same amount was obtained. The couple moved into one flat after their marriage in 1971. The rent from the other flat paid the outgoings on the property. Until the couple separated in 1975 the wife worked and used her wages to pay household expenses. She purchased furniture and fixtures for both flats costing $3,000, and assisted the husband in re-decorating the property.

The value of the property at the time of the separation was $32,000. The present value is $35,000. Since the separation the husband has paid interest on the mortgage and rates, he has had exclusive possession. What share of the property is the wife entitled to?

The house is matrimonial property — s.8 (a). Are both flats to be regarded as the matrimonial home and therefore to be divided equally — s.11 (1) (a), or is the value of one flat to be divided according to s.11 (1) (a) and the other according to s.15 (1)? If s.15 applies does the husband’s greater financial contribution amount to a “clearly greater contribution” such that division should not be equal. The marriage has been relatively short and there are no children so household tasks would not have been especially onerous. However the wife has put her best efforts into the marriage partnership.

The husband should not be credited with expenditure since the separation as he has been receiving the rent from matrimonial property.

cf. Smillie, 1976 R.L. 101 — the whole property was regarded as the matrimonial home and the wife given a quarter share.

2. Property governed by the Act — Contributions

Throughout the 21 years of marriage the couple had lived rent free with the wife’s mother. The husband owned separate property which he rented. The husband spent $5,000 maintaining and decorating his mother-in-laws house. After the couple separated in 1976 the mother gifted half of the house to the wife.

Can the husband claim a share of the wife’s interest in the property?

The wife’s share is separate property — s.9 (4). The husband cannot claim under s.9 (3) (a) or s.17 (1) (a) as his actions were not directed to property which was, at the time, the wife’s.

The only possibility of a claim is if the husband can persuade the Court that his contributions to the marriage partnership justify an order out of
entered into prior to 1 February 1977. This very open ended provision will, barring an amendment, be effective for many years. It does not have the precision of s.6 (2) of the Matrimonial Property Act, 1963 which initially caused so many difficulties in its application. (See Stevens, 1974 2 N.Z.L.R. 129; Jones, 1975 2 N.Z.L.R. 347).

An agreement requires a consensus, offer and acceptance, but these may be oral or written, express or implied. Difficulties of proof will be enormous. It is possible that the court will follow cases decided under s.6 (2) of the previous Act and regard only those agreements which are express and intended to ensure in the circumstances which have occurred, and are still subsisting at the time of the court hearing.

However s.55 (1) must be contrasted with s.57 (5) which considers an agreement by way of settlement of any question of property. It is arguable that s.57 (5) covers the type of agreement reached in an intent to establish property rights i.e. the sort considered sufficient to invoke the bar under s.6 (2) of the 1963 Act, and therefore s.55 (1) covers any agreement, for whatever purpose and whether intended to ensure. S.57 (5) was, in all probability, inserted to ensure that a spouse who had reached a property settlement under the provisions of the 1963 Act after marriage breakdown did not attempt to try to reopen the dispute under the new Act.

The agreement is not binding on the court but my concern is that if s.55 (1) is widely construed individuals may be encouraged to use an ‘agreement’ as a means of challenging the automatic division provided for by the Act. The White Paper which accompanied the initial Bill stated that one of the Bill’s purposes was to create a certain system of property ownership so that litigation would be unnecessary except in the most unusual of cases. This purpose could be defeated by a liberal interpretation of s.55 (1).

Examples: agreements under the 1963 Act.

Ritzma, 1975 R.L. 208 — the wife was held to be bound to the unequal share holding between herself and her husband in the family business agreed to in the memorandum of association of the company. Ryan, 1975 R.L. 165 — the home was purchased with money provided by the husband who then formally gifted it to the wife. Although the gift was an unilateral one the court held that it amounted to a common intention which bound the husband.

Catton, 1976 R.L. 17 — Wife was held not to be bound by a provision in a separation agreement giving the house to the husband as it was subject to a condition which the husband had not fulfilled.

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

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)
Ther e 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" it, there are no dependant children of the marriage and the wife has not diminished her ability to provide for herself by reason of having placed her family responsibilities before her employment opportunities. Maintenance will still be necessary where the wife cares for dependent children.

S.32 attempts to ensure that all financial matters are considered at the one hearing so that an overall just solution may be reached. Under the 1963 Act the court tended to discount property awards because of maintenance payments. Property division will now usually be automatic thus maintenance will be the flexible element in achieving an overall just financial result.


In the Supreme Court the wife was awarded a half share in the matrimonial home and adjoining section (together worth $68,000), exclusive possession of the home; maintenance of $65 pw for herself and $12 pw for each of two dependent children; a $2,500 lump sum and the right to take provisions from her husband's business. The wife had successfully petitioned for a divorce based on the husband's adultery. The Judges of the Court of Appeal accepted that the wife had made a substantial contribution to the home. However, having regard to the effect of the combination of the property and maintenance orders they considered that the husband was being required to expend too much capital to maintain his family. Other than the home and section the husband had assets of $6,500 plus an interest in his father's estate of $9,400. The Court considered that his share in his business had minimal resale value. The lower court's orders were varied. The wife was given a 1/3 interest in the home, $60 pw maintenance, $7.50 for one child and $10 pw for the other. The capital sum was affirmed. The section was vested solely in the husband.

15. RESTRAINING DISPOSITIONS — s.43
The court may restrain a disposition being made to defeat an application under the Act. Section 43 follows the wording of s.80 Matrimonial Proceedings Act. It is to be hoped that s.43 will be interpreted so as to give more protection than was afforded by s.80.

cf Chapman, Supreme Court, Auckland. 23.6.73. Mahon J.

The wife attempted to place a caveat against property owned by the husband. When the husband was successful in having it removed the wife applied for an order under s.80. The order was refused when the husband satisfied the court that he was not selling to defeat the wife's claim but because of ill health. No order for security was made.

The new Act offers little protection against dissipation of assets. It is hoped that this will be borne in mind when a court is asked to exercise its discretion under s.43

16. TRANSITIONAL PROVISIONS — s.55, s.57
S.55 (1) requires the court to take into consideration any agreement
uncertainty and is financially and emotionally destructive.


General matrimonial misconduct will be relevant under subclauses (d) and (e).

It should be noted that s.79 of the Matrimonial Proceedings Act cannot be used to alter an agreement unless the variation is in the interests of any child of the marriage.

Example: A couple each own a business at the time of the marriage. Both businesses are moderately successful when the couple agree that 50% of the nett profits from each business shall be matrimonial property. One business remains moderately successful while the other becomes an international enterprise worth millions of dollars. S.21 (10) (d) may be used to have the agreement avoided. It is submitted that where a couple have made an agreement a clearer case of injustice must be made out that need be established to invoke the Court’s discretion under s.15 (1).

12. CONCURRENT JURISDICTION — s.22

S.22 (3) places the onus of satisfying the Supreme Court that a matter should stay in the lower court on the party wishing to retain the original jurisdiction. If the party who wished to switch jurisdictions had to justify his/her request tactical switches of jurisdiction would be discouraged. Such tactics are, unfortunately, encouraged by s.22.

13. INTERESTS OF THE CHILDREN — s.26

The new Act places much greater emphasis on the interests of the children than the 1963 Act. Settlement of property on the children was previously unusual and seems to have been regarded by the majority of judges as a possibility to be considered only when future maintenance payments were uncertain.

S.26 gives a general power to settle property on the children while s.21 (16) allows such an order to disturb the provisions of an agreement.

Uncertainty of future maintenance payments and the special requirements of a particular child e.g. a handicapped child, may be the type of factors influencing the exercise of discretion under this section.

See Carruthers, 1975 R.L. 161, for a fact situation in which s.26 might have been used. (The facts of this case are discussed in the attached problems).

14. PROPERTY AND MAINTENANCE — s.32

Many jurisdictions which have community property schemes do not provide for spousal maintenance, or limit payments to a short period after dissolution of the marriage. The rationale for this approach is that if a wife obtains half of the assets built up during the marriage there is no reason why the husband should continue to support her out of his share. This logic only applies if there is some matrimonial property, the wife receives half of

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, contemporaneously, 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 work out their own property schemes. It recognises that there is no single ideology of marriage; that there is current in our society the partnership model and, increasingly, marriages as unions of independent equals striving for maximum individual fulfilment.

Attacking agreements: s.21 (8) (b) gives the court a discretion to declare void any agreement where it would be unjust to give effect to it. S.21 (10) gives guidelines for the exercise of the discretion. The power granted is very wide but as all couples who enter into agreements will have been independently advised — s.21 (5), it is to be hoped that the courts will follow their practice under s.79 Matrimonial Proceedings Act, 1963, and avoid agreements only in very unusual cases. Note the power given by s.21 (8) is not one to vary but only to avoid. If the agreement is void the other provisions of the Act apply as if an agreement had never been made — s.21 (12).

S.21 (10) (c) — agreements unfair or unreasonable in light of all the circumstances at the time of signing. Some element of fraud or inequality in bargaining power should be shown. The latter will be difficult to prove when each party has been independently advised. Courts in the past have been reluctant to accept claims that an agreement should be set aside under s.79 Matrimonial Proceedings Act as unfair because entered into when the applicant was distraught if the applicant had been independently advised — McKavangh. 1976 R.L. 33.

cf. Richards, 1971 N.Z.L.R. 222. This case was concerned with an application to vary a maintenance agreement under s.85 (3) Domestic Proceedings Act, 1968. The husband had agreed to pay his wife a sum of maintenance in the belief that she was going to take a part-time job and find accommodation for herself and the children. In fact at the time the agreement was entered into the wife had obtained a housekeeping position and was receiving free board for herself and the children and a wage. The Court varied the agreement on the basis that it was unfair at the time it was entered into. The Judge commented that for an agreement to be unfair or unreasonable the matter alleged must be so at variance with the original contemplation of the parties that, in the opinion of the court, the person seeking the variation would not have entered into the particular agreement had the true position been known. s.21 (10) (d) — unfair or unreasonable in light of change in circumstances.

The agreement, being made to contract out of a scheme intended to come into effect mainly on breakdown of marriage or to settle a particular dispute, will be made with the event of marriage breakdown in mind. Therefore the occasion of marriage breakdown or its cause should not in itself be such as to make it unjust to enforce the agreement. However the subclause states that it does not matter whether or not the changes were foreseen by the parties. It is submitted that this clause is in line with the policy of the rest of the section that spouses are adults capable of managing their own property. Wide discretions encourage litigation which creates
In the general case each spouse has a protected interest in one half of the value of the matrimonial home — s.20 (2); the matrimonial chattels may not be sold to defeat a claim under the Act — s.45; dispositions intended to defeat a claim under the Act may be restrained or in some cases set aside — s.s. 43, 44; but little protection is given against a spouse who mortgages or dissipates matrimonial property.

Most full community property systems make dispositions of certain types of property invalid unless the consent of both spouses is obtained.

The "owner" of matrimonial property may sell or mortgage it and dissipate the proceeds. The other spouse's remedy is an action for division of the matrimonial property or declaration of interest in particular property — s.25 (2) (c). In such cases the court may order a spouse to transfer separate property or make a money payment from separate property (s.20 (6), s.33 (3) (n) ), or diminish the share of the offending spouse in the matrimonial property — s.15. If there is no separate property and the matrimonial property has been so diminished that even the full amount is insufficient to satisfy the 'innocent' spouse it is unfortunate. It is also unfortunate that litigation is necessary to protect the interest of a spouse (s.42 notices only)

11. CONTRACTING OUT OF THE SCHEME — s.21

Section 21 is intended to give maximum freedom of choice to couples to

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 acquired (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)

than use them for family purposes. This foregoing of a higher standard of living is a contribution by the wife (it cannot be regarded as a contribution by the husband as it has increased the value of his separate property). The contribution can be used by the wife to claim that the increase in the value of the farm due to monies not being taken out is matrimonial property—s.9 (3) (a); or to give her a larger share in the matrimonial property or an award from separate property—s.17 (1) (b), if “actions” can be construed to cover negative as well as positive actions; or simply weighed with her other contributions to the marriage partnership affecting the courts exercise of discretion under s.15 (1) and s.13 (1) (c).

Misconduct—to be relevant it must be ‘gross and palpable’ and have significantly affected the extent or value of the property. Such misconduct may be a reason for making a less than equal division and it may be taken into account when the court determines the form of order to make.

The word “gross and palpable” possibly comes from English decisions concerned with the effect of conduct on the Courts’ exercise of discretion in awarding maintenance and making property settlements. The phrase “gross and obvious” achieved prominence in Wachtel, 1973 Fam. 72.

In *Harnett*, 1973 Fam. 156 at 165 Bagnall J. explained that “gross” describes the conduct while “obvious” describes the clarity or certainty with which it is seen to be gross. He continued: “In my view to satisfy the test the conduct must be obvious and gross in the sense that the party concerned must be plainly seen to have wilfully persisted in conduct, or a course of conduct, calculated to destroy the marriage in circumstances in which the other party is substantially blameless.”

See also *Guzner v. Underdown*, 1974 2 All E.R. 351. It must be emphasised that the English Judges were concerned with general misconduct. S.18 is only concerned with misconduct which affects the extent or value of property. A spouse who gambles excessively thereby diminishing his/her contribution to the partnership or causing matrimonial property to be sold or mortgaged; a spouse who drinks to excess diminishing his/her ability to earn or contribute to the family welfare; a spouse who persists in giving expensive gifts to outsiders, may be conducting himself/herself in such a way as to invoke the Court’s exercise of its discretion to award the offending spouse a less than equal share in the matrimonial property despite a considerable positive contribution to the property.

10. MATRIMONIAL PROPERTY AND CREDITORS—s.19, s.20

These sections make it clear that the scheme of the Act is one of a deferred rather than a full community of property. The “owner” is free to deal with his/her property during the relationship. Restraints and protections are, unfortunately, few. Non-owning spouses would be wise to ensure that homes are registered as joint family homes, and other property as joint tenancies or tenancies in common, or they should make use of s.42.
home and used her income for family purposes. If the first wife is to get 50% of the property (and her efforts might well be equal to those of a husband who has simply worked from 9-5) is the second wife to get a more than equal share?

It should be noted that studies in New Zealand (“Career, Marriage and Family”, Society for Research on Women, Wellington 1976; “Dual Career Families”, S.R.O.W Auckland, 1976) of families in which both spouses work show that the wife generally retains major responsibility for child care and household management.

A recent case under the 1963 Act illustrates this situation.

*King*, Sup. Ct. Wellington. 22.11.76 M102/76. White J.

The couple were married in 1957. The wife worked outside the home for most of the marriage and averaged slightly higher earnings than the husband. The wife did all the housework and had major responsibility for the care of the children. The husband provided for the family budget “but made sure his own way of life did not suffer.” The equity in the home was less than it would have been had the husband spent less on his own pleasures. The Judge granted the wife a 75% interest in the house on the basis that her contribution was “much greater than the husband’s.”

The other side of the coin is where the husband has substantial income. It is submitted that it is unlikely that the courts will regard ordinary domestic contributions as being of equivalent weight. The wife in such cases will possibly be regarded as being sufficiently rewarded for her services by a half share of the home and family chattels.

8. SUSTENANCE OR DIMINUTION OF SEPARATE PROPERTY — s.17

Section 17 complements s.9 (3) (a). It is intended to aid people such as Mrs Haldane whose efforts in aid of her husband’s separate property did not result in any increase in the value of the property but where nevertheless efforts for the marriage partnership which should be recognised. Under the Act for her efforts Mrs Haldane might receive an increased share in the homestead or family chattels, or her husband might be ordered to make her a payment from his separate property. (The application of the new Act to the Haldane facts is considered in one of the problems attached to these notes.)

Can “actions” in s.17 (2) be negative as well as positive? For example a husband is required to gradually sell shares which are his separate property to pay for a housekeeper because his wife prefers playing bridge to doing the housework, should the wife’s share of the matrimonial property be decreased by the amount spent?

9. CONTRIBUTIONS — s.18

Is the list exhaustive? of the wording of s.33 (3).

S.18 (1) (g) foregoing a higher standard of living — e.g. a husband’s farm is separate property, he choses to leave the profits in the business rather
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.

would be against the policy of the Act. The Act is not intended to force women into the work force (see the preamble). Mrs James had at all times put her best efforts into her domestic role.

S.14 might be applicable where property of considerable value had been built up despite the extravagance of, and lack of assistance from, the wife.

Where property has been retained solely because of the efforts of one spouse after desertion of the other spouse s.14 may apply—

King 1974 R.L.101—the house in dispute had been purchased with the proceeds of the sale of a former home to which the applicant wife had made no financial contribution. The husband deserted the wife the year the property was purchased and was untraced for six years. The wife retained the home out of a domestic purposes benefit and part-time earnings. The wife was given a 2/3 interest in the property and exclusive possession.

See also Andrew 1976 R.L.17

**7. DIVISION OF OTHER PROPERTY—s.15**

The length of the marriage is not automatically a factor.

Contrast “clearly greater” in s.15 (1) with “clearly disproportionately greater” s.13 (1) (c). S.15 (1) as reported back from the Statutes Revision Committee also contained the word “disproportionately”—it was presumably eliminated because, inter alia, of the opposition of the Federated Farmers Assoc., to the Act.

Note that the onus of proving greater contribution rests upon the spouse disputing the equal division.

Contributions which are of concern are those to the marriage partnership not to a particular asset. S.18 (2) declares that there shall be no presumption that a contribution of a monetary nature is of greater value than one of a non-monetary nature. Contributions should not be translated into monetary terms and set upon a balance sheet—such an approach would be inherently unjust to women as the average female wage is far less than the average male wage.

The Act is based upon the concept of marriage as a partnership to which each contributes according to their particular role and abilities. It is particularly designed to protect the women in a traditional role segregated marriage. In line with this philosophy concern should be only with whether each spouse has to the best of his/her ability used all his/her efforts for the benefit of the family unit. The Act recognises that it is impossible to attempt to evaluate efforts in monetary terms—some husbands do not wish their wives to work outside the home, some even get pleasure or benefit from the wife’s pursuit of leisure activities in place of household tasks. However when spouses challenge the automatic equal division the courts will be forced to evaluate the services of a housewife who has put all her efforts into her household tasks and left her husband to supply the income against the efforts of a wife who has not only had full responsibility for child care and household management but has also worked outside the